Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-5–03 OF 2019(W)
TENGKU MAIMUN CHIEF JUSTICE, ROHANA YUSUF PCA, NALLINI PATHMANATHAN, ABDUL RAHMAN SEBLI, HASNAH HASHIM, MARY LIM AND HARMINDAR SINGH FCJJ
8 JANUARY 2021

Constitutional Law — Fundamental liberties — Right to life and personal liberty — Article 5(1) of Federal Constitution ('the FC') — Whether 'personal liberty' or 'life' in art 5(1) encompassed a citizen's right to leave Malaysia to travel abroad — Whether Director General of Immigration ('DG') had power under s 3(2) of the Immigration Act 1959/63 to prevent citizen who had valid international passport from leaving country to go abroad on ground she had disparaged/demeaned Government of Malaysia in her speeches or actions — Whether such an 'offence' was non-existent in the Immigration Act — Whether s 59A of the Immigration Act could prohibit judicial review of Minister's or DG's action in blacklisting citizen and preventing her from going abroad for committing such an 'offence' — Whether s 59 of the Immigration Act was valid for denying citizen of right to be heard before a travel ban was imposed on him/her — Whether ss 59 and 59A were unconstitutional and void — Whether art 4(1) of the FC gave court the right and power to undertake constitutional judicial review of any post-Merdeka law and strike it down for being inconsistent with the FC

The appellant, who was the chairperson of a non-governmental organisation ('NGO'), was at the Kuala Lumpur International Airport on 15 May 2016 about to board a flight to South Korea when she was prevented from doing so by immigration officers. They merely told her, without giving any reason, that she had been banned from leaving the country. It was only when the appellant commenced judicial review proceedings to challenge her travel ban that she discovered that on the first respondent's instruction, she was blacklisted from leaving the country for a period of three years from 6 January 2016 on the ground she had disparaged/demeaned the Government of Malaysia ('memburukkan Kerajaan Malaysia') in her speeches and actions at various forums and assemblies. The respondents lifted the blacklisting and travel ban on the appellant two days after she was prevented from leaving the country on 15 May 2016. The purpose of her trip to South Korea was to attend an international human rights conference where she was to give a speech and accept an award in her capacity as a member of the NGO. The appellant's judicial review application was premised on the ground that the decision to prevent her from leaving the country was baseless, unreasonable, irrational and

unfair. She asserted that the respondents, or either one of them, had: (a) acted in excess of their jurisdiction because there was no provision either under the Immigration Act 1959/1963 ('the Immigration Act') and/or other relevant statutes to bar a citizen from travelling overseas in similar circumstances; (b) breached her fundamental liberties under arts 5, 8 and 10 of the Federal Constitution ('the FC'); (c) breached the principles of natural justice in not according her a right to be heard; (d) breached the requirements of procedural fairness in not informing her at any time of the travel ban and the reason for the same; (e) acted irrationally and in violation of her legitimate expectation to travel abroad since she had a valid passport. The reliefs the appellant sought were, inter alia: (i) an order of certiorari to quash the respondents' decision to prevent her from travelling abroad; (ii) declarations that the said impugned decision was in excess of jurisdiction and breached arts 5, 8 and 10 of the FC and was therefore unconstitutional and void; (iii) a declaration that she could not be deprived of a right to be heard under s 59 of the Immigration Act; and (iv) a declaration that s 59 and s 59A (which provided that no decision or action of the respondents under the Immigration Act could be judicially reviewed save with regard to non-compliance with any procedural requirement) were unconstitutional and void. The High Court applied the Federal Court's decision in *Government of Malaysia & Ors v Loh Wai Kong* [1979] 2 MLJ 33 ('Loh Wai Kong') and dismissed the judicial review application essentially on the ground that a citizen did not have a constitutional right to travel abroad; hence the government had the power to prevent a citizen from leaving the country. The court also held that the respondents were not obliged to inform the appellant of the reason for her travel ban and that s 59 clearly provided that she had no right to be heard before the ban was imposed. The Court of Appeal ('COA') dismissed the appellant's appeal on the ground that since the travel ban on her had been lifted, the appeal was rendered academic and hypothetical. The COA also held that under s 59A of the Immigration Act the decision to bar the appellant from leaving the country was clearly not judicially reviewable. The questions posed to the Federal Court in the instant appeal were: (1) whether s 3(2) of the Immigration Act gave the Director General of Immigration unfettered discretion to impose a travel ban on a citizen especially if that citizen had been openly critical or disparaging of the government; (2) whether s 59 was valid and constitutional; and (3) whether s 59A was valid and constitutional in the light of the Federal Court's decisions in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 ('Semenyih Jaya') and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 ('Indira Gandhi') both of which cases upheld the doctrines of constitutional supremacy, separation of powers and Rule of Law in Malaysia and ruled that despite the 1988 amendment to art 121(1) of the FC, judicial power continued to reside in the Judiciary under the doctrine of separation of powers and could not be abrogated or removed even by constitutional amendment. The appellant also relied upon the Federal Court's decision in *Alma Nudo Atenza v Public*

Prosecutor and another appeal [2019] 4 MLJ 1 ('Alma Nudo Atenza') where a nine-member bench affirmed the constitutional principles expressed in the aforesaid two cases and ruled that Parliament could not oust judicial review as the doctrines of separation of powers and independence of the judiciary were basic structures of the FC which could not be destroyed. The respondent relied, inter alia, upon the Federal Court's decision in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72 ('Sugumar Balakrishnan') which had held ss 59 and 59A of the Immigration Act to be valid and constitutional. In the instant appeal, the appellant argued that: (A) the respondents had no power under s 3(2) of the Immigration Act to ban her from leaving the country; (B) not only was the reason for her travel ban never made known to her at any time, but the reason the respondents subsequently gave for the ban were untenable; (C) the respondents had, on their own, created an offence of 'Memburukkan Kerajaan Malaysia' that necessitated punishment by the imposition of the travel ban; (D) the travel ban infringed her fundamental liberties under arts 5 and 10 of the FC; (E) the Immigration Department Circular relating to the travel ban was invalid and had no force of law; and (F) the respondents' arbitrary action, failed the proportionality test and was unconstitutional. The respondents relied on an affidavit they had filed in the judicial review proceedings which, inter alia, stated that: (I) the appellant was blacklisted and barred from travelling overseas since 6 January 2016 (the ban was lifted on 17 May 2016) because of her (then) intended involvements in: (a) the 'People's Movement Can Bring Change' forum scheduled to be held on 7 January 2016; and (b) the organising of a public protest against the Anti-Trans Pacific Partnership Agreement scheduled on 23 January 2016 — both of which events had the potential of demeaning the Government of Malaysia; (II) for the 'offence' of demeaning the government, the maximum period of suspension of passport was three years subject to the first respondent's discretion to lift the ban earlier; and (III) the authorities were not statutorily obliged to inform the appellant of the travel ban before it was imposed.

Held, (a) unanimously finding that the first respondent had no power to impose the travel ban on the appellant in the circumstances of the case; and (b) by majority, holding that ss 59 and 59A were valid and constitutional:

(1) **(per Tengku Maimun Chief Justice, dissenting)** *Semenyih Jaya* and *Indira Gandhi* effectively held that the amendment to art 121(1) of the FC did not in any way hinder judicial power and that it had always remained vested in the Superior Courts since Merdeka Day in spite of the 1988 amendment to art 121. Accordingly, art 121(1) must be read as it was prior to the 1988 amendment and the said amendment must be construed as not diminishing or subordinating judicial power to Parliament or declaring Parliament supreme in any way. The aforesaid two cases had also demolished the Federal Court's reasoning in *Sugumar Balakrishan* that because art 121(1) had been amended the way it was, the

courts must now uphold ouster clauses contained in federal laws. *Semenyih Jaya* and *Indira Gandhi*, which were approved and followed by a nine-member bench in *Alma Nudo Atenza*, held that judicial review could not be excluded by any Act of Parliament (see paras 74, 76–77, 80 & 235).

(2) **(per Tengku Maimun Chief Justice, dissenting)** The supremacy of the FC as declared in art 4(1) and its corollary device of judicial power were basic features of the FC. Accordingly, the court's power to scrutinise State action whether legislative, executive or otherwise, could not be excluded. The respondents' submission that the courts could only scrutinise what Parliament allowed to be scrutinised had to be rejected because it was reminiscent of Parliamentary supremacy. Under art 4(1), all laws were subject to the FC. And as garnered from the FC's legislative history, art 4(1) was intended to cover all acts, whether legislative, executive, quasi-legislative, quasi-judicial, etc. In the presence of a written constitution declaring itself to be the highest source of law, the English method of resolving the legality of ouster clauses simply on the basis of statutory construction, much in the way the respondents had suggested, could not be adopted. Section 59A must be assessed from the larger angle of whether ouster clauses as a whole were constitutionally valid in the light of art 4(1). The Legislature could not eliminate judicial review entirely or prohibit absolutely the right to remedies to the extent that the process of judicial review was rendered nugatory (see paras 81–83 & 125–126).

(3) **(per Tengku Maimun Chief Justice, dissenting)** The Judiciary was the organ tasked to interpret the law under art 121(1) and was thus the medium through which art 4(1) operated. These provisions formed part of the basic structure of the FC. The combined effect of the two said articles was that ouster clauses could never oust, diminish or exclude the judicial power of the courts and its vehicle, judicial review — no matter how cleverly and widely crafted, and no matter whether they purported to exclude judicial review entirely or just the portion on remedies. Since s 59A restricted not just the scope of judicial review but the remedies which may be afforded therefrom, it was invalid and unconstitutional (see paras 89 & 98–99).

(4) **(per Tengku Maimun Chief Justice, dissenting)** Nothing in the respondents' Circular suggested, even remotely, that the respondents had the power to blacklist a person holding a valid passport apart from the specific factual situation in which they lost their passport. It was unclear under what written law the Circular purported to exist. Nothing in it allowed the respondents to impose the travel ban on the appellant premised on the reasons that were advanced in this case (see paras 135–136).

(5) **(per Tengku Maimun Chief Justice, dissenting)** The Federal Court's decision in *Loh Wai Kong* that the right to travel abroad was a privilege and not a fundamental right was not a binding precedent because: (a) the issue in that case was the government's refusal to renew a passport and not the imposition of a travel ban on a citizen who was in possession of a valid functional passport; (b) the decision of the court was made without jurisdiction because it breached the principle that a party could only appeal against the judgment of the court and not the reasons for the judgment or any 'statement' or 'finding' in the judgment (see paras 147–148).

(6) **(per Tengku Maimun Chief Justice, dissenting)** On a prismatic and purposive reading of art 5(1) of the FC and grounded on high authority and the fact that the FC was a living and organic document, 'personal liberty' in art 5(1) of the FC encompassed the right to travel abroad. The appellant's fundamental right to travel abroad was therefore breached and the respondents' contention that ss 3(2) and 4 of the Immigration Act allowed them to impose the travel ban was unacceptable upon a literal construction of those two sections. The power to impose a travel ban on international travel was similarly absent under the Passports Act 1966. Without a positive provision of law setting out clearly and unequivocally the respondents' right to impose the travel ban, their action in doing so was unlawful (see paras 172–176, 178 & 181–182).

(7) **(per Tengku Maimun Chief Justice, dissenting)** Section 59 unequivocally excluded natural justice (the right to be heard) and hence purported to exclude procedural fairness guaranteed by arts 5(1) and 8(1) of the FC. It was accordingly invalid and unconstitutional. Even if Parliament had expressed its intention to exclude the right to be heard with 'irresistible clearness' in s 59, the provision was nevertheless incongruous with our 'system of law' which constitutionally established procedural fairness (see paras 197 & 218).

(8) **(per Nallini Pathmanathan FCJ, dissenting)** power in art 121(1) should be read subject to art 4(1) which was the primary Article that defined the nature and extent of judicial power. Article 121(1) could not be construed in isolation. The starting point for the construction of judicial power in art 121(1) must be art 4(1) because it not only declared the FC to be the supreme law of the land but empowered the Judiciary to strike down any post-Merdeka law that was inconsistent with the FC to the extent of the inconsistency. As only the Superior Courts could carry out this function, it followed that art 4(1) enshrined the constitutional right of judicial review. *Sugumar Balakrishnan*, which upheld the constitutionality of s 59A, was no longer good law because it failed to consider the constitutional right of judicial review in art 4(1) (see para 389).

(9) **(per Nallini Pathmanathan FCJ, dissenting)** The power of constitutional judicial review in art 4(1) was a fundamental or essential feature of the FC which could not be amended, abrogated or removed by any legislation or constitutional amendment. No legislation could override or curtail this constitutionally conferred jurisdiction. Article 4(1) thus enshrined the Rule of Law and the doctrine of separation of powers and comprised the entire basis for the operation of the three arms of government. If art 121(1) was to be read literally to mean the jurisdiction and powers of the Superior Courts was limited to the extent determined by federal law, how could the courts carry out the dictates of art 4(1) to strike down any federal law for being inconsistent with the FC when the court's power to judicially review that law had been ousted by the same federal law? (see paras 269 & 389).

(10) **(per Nallini Pathmanathan FCJ, dissenting)** On the basis of art 4(1) alone, s 59A could not subsist and was void. By excluding judicial review altogether, save in respect of procedural matters only, s 59A encroached upon judicial power by contravening art 4(1) which enabled all statutory provisions to be examined in their entirety for constitutional validity (see paras 271–275).

(11) **(per Nallini Pathmanathan FCJ, dissenting)** The right to travel abroad was a fundamental right falling within the 'right to life' in art 5(1) of the FC and that right could only be curtailed in accordance with law which was fair, just, proportionate and reasonable and neither arbitrary nor capricious both substantively and procedurally. The respondents contravened that right by preventing the appellant from travelling abroad despite her having a valid passport. Section 3(2) of the Immigration Act did not in any manner empower the respondents to blacklist or bar the appellant from travelling abroad on the ground that she had tainted the image of the government or the country. As a consequence of barring the appellant from travelling abroad, the respondents had also breached her right to freedom of speech and expression under art 10 of the FC (see paras 393–394, 404, 406 & 409–410).

(12) **(per Nallini Pathmanathan FCJ, dissenting)** Since s 59 denied the appellant of natural justice (ie, the right to be heard), it was inconsistent with art 5(1) of the FC and was consequently void (see paras 426–439).

(13) **(per Abdul Rahman Sebli FCJ, majority)** Sections 59 and 59A were not void for being inconsistent with art 4(1) read with art 121(1) of the FC. The limitation of the court's review power by s 59A fell squarely within the power of Parliament to legislate pursuant to the power conferred on it by art 121(1) of the FC and was not in breach of the doctrine of separation of powers, which could not, in any event, prevail over the FC (see para 694).

(14) **(per Abdul Rahman Sebli FCJ, majority)** The doctrine of constitutional supremacy did not allow any doctrine of law to override or take precedence over the written terms of the FC which, as declared by art 4(1) of the FC, was the supreme and highest law in the land. Whatever might be construed as forming part of the 'basic structure' of the FC, there could be no argument that post-Merdeka laws could only be declared void under art 4(1) if they were inconsistent with the FC and for no other reason. In the present case, the question was whether s 59A (being a post-Merdeka law) was inconsistent with art 121(1) and not whether it was inconsistent with any doctrine of law no matter how formidable the doctrine of law was. In any event, a doctrine of law could not prevail over the FC (see paras 597 & 692–693).

(15) **(per Abdul Rahman Sebli FCJ, majority)** To be inconsistent with the FC meant to be inconsistent with any article of the FC that related to the legislative scheme of the impugned law. The legislative scheme of s 59A was to limit the judicial review power of the High Court to procedural non-compliance by the decision-maker. Clearly, that was within the competence of Parliament to legislate pursuant to the power conferred on it by art 121(1). Section 59A was therefore not void under art 4(1) for being inconsistent with art 121(1) of the FC (see para 471).

(16) **(per Abdul Rahman Sebli FCJ, majority)** *Sugumar Balakrishnan* was the prevailing authority on the constitutional validity of ss 59 and 59A and not *Semenyih Jaya*, *Indira Gandhi* or *Alma Nudo Atenza* because it was a case that was directly concerned with the validity of those two sections. *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza* were not at all concerned with the constitutional validity of ss 59 and 59A so there was no question of the decision in *Sugumar Balakrishnan* 'flying in the face' of the decisions in those three cases (see paras 507 & 510–511).

(17) **(per Abdul Rahman Sebli FCJ, majority)** There was no dispute that s 59A was enacted pursuant to art 121(1) of the FC. It was this article and not any other article that vested judicial power of the Federation in the courts. Section 59A was not enacted pursuant to any other article of the FC which it could be inconsistent with and therefore void under art 4(1). The appellant seemed to be arguing that s 59A was void not because it was inconsistent with art 121(1) but because it was inconsistent with arts 5(1), 8(1) and 10(1) of the FC — although no reference to these articles were made in the leave questions. These articles had no relevance whatsoever to the issue before the court, which was whether Parliament was vested with power by art 121(1) to enact s 59A. The answer to this question depended on whether Parliament had acted within the constitutional framework of art 121(1) when it enacted s 59A and not whether the section was void for being inconsistent with arts 5(1), 8(1) or 10(1). Clearly, the enactment of s 59A was sanctioned by art 121(1), thus

making it a valid ouster clause. A valid ouster clause could not be struck down under art 4(1) of the FC (see paras 513–517).

(18) **(per Abdul Rahman Sebli FCJ, majority)** Article 4(1) safeguarded the supremacy of the FC and came into play when there was inconsistency between any post-Merdeka law and the FC and the inconsistency was irreconcilable with the terms of the relevant Articles of the FC. Article 4(1) had nothing to do with the judicial power of the Federation. The judicial power of the Federation was governed by art 121(1) and not by art 4(1) or any other Article of the FC (see para 518).

(19) **(per Abdul Rahman Sebli FCJ, majority)** Article 4(1) could render s 59A void only if the latter was inconsistent with any constitutional provision that conferred it with legitimacy and force or law. It was only art 121(1) of the FC, and no other article, that gave s 59A its legitimacy and force of law. For that reason, s 59A could only be void if it was inconsistent with art 121(1) and not with any other article of the FC which had nothing to do with Parliament's power to enact federal law pursuant to art 121(1). The appellant had not shown how s 59A was inconsistent with art 121(1) other than to say that it violated the doctrine of separation of powers, which she said was a 'basic structure' of the FC (see paras 519 & 590).

(20) **(per Abdul Rahman Sebli FCJ, majority)** Article 4(1) could not be invoked to strike down just any post-Merdeka law that was inconsistent with just any article of the FC. The article that the post-Merdeka law was inconsistent with must relate to the relevant subject-matter and legislative scheme of the impugned law that was sought to be declared void under art 4(1). Likewise, art 4(1) could not be invoked to strike down any law that was inconsistent with itself as art 4(1) did not operate by itself and on its own but was a mechanism to declare any post-Merdeka law void for being inconsistent with any other relevant article of the FC (see paras 521–523).

(21) **(per Abdul Rahman Sebli FCJ, majority)** The source of judicial power in the Federation was art 121(1) of the FC and not any other article. Without art 121(1), the courts would have no judicial power to exercise. The other articles of the FC did not confer judicial power on the courts. It was a term of art 121(1) that the courts had such jurisdiction and powers 'as may be conferred by or under federal law'. In the present case, federal law, vide s 59A, had expressed with irresistible clearness that the two High Courts could only review procedural non-compliance and not the substantive decision of the decision-maker. If the two courts ignored the limitation imposed by s 59A in the name of separation of powers and judicial independence, they would be defying art 121(1) of the FC, which they were not at liberty to do (see paras 524 & 528–531).

(22) **(per Abdul Rahman Sebli FCJ, majority)** Being a provision that governed judicial power of the Federation, art 121(1) could not be suborned to any doctrine of law, including the Indian doctrine of basic structure and the common law doctrine of separation of powers. No doctrine of law could override art 121(1) which stipulated in clear language that the jurisdiction and powers of the High Courts and inferior courts were 'as may be conferred by or under federal law'. The question of this express term of the supreme law being in violation of the doctrine of separation of powers did not arise (see para 562).

(23) **(per Abdul Rahman Sebli FCJ, majority)** Section 3(2) of the Immigration Act clearly conferred on the first respondent a broad power over 'all matters relating to immigration'. The fact that the respondents gave a wrong and invalid reason for imposing the travel ban on the appellant did not in any way alter the fact that in law they had no duty to provide reasons. Thus, even if the first respondent was wrong in relying on a departmental circular which did not have any force of law to impose the travel ban, that did not turn his decision into a wrongful act if otherwise the decision was permitted by law, which decision was not subject to a right of hearing under s 59 and not subject to judicial review under s 59A. On the strength of the Federal Court's decision in *Loh Wai Kong*, if it was not a constitutional right for a citizen to leave the country to travel overseas, it could not then be a breach of the law for the respondents to impose the travel ban on a citizen. To say that the first respondent had no power to impose a travel ban under s 3(2) of the Immigration Act was plainly wrong. However, on the peculiar facts and circumstances of this case, the reason given by the first respondent for imposing the travel ban turned out to be inappropriate (see paras 624, 627, 629 & 644–646).

(24) **(per Mary Lim FCJ, concurring)** The respondents' explanation for the travel ban and the departmental Circular that they relied upon had several fatal flaws. At the time the respondents blacklisted the appellant, the events she was accused of participating in had yet to take place. By its own terms, the Circular not only did not authorise the respondents to blacklist the appellant whether for the reasons proffered or at all, but it was invalid and had no force of law. None of the matters stated in the Circular applied to the appellant. Hence, on the strength of the Circular itself, the impugned decision was clearly invalid and offended its own procedural requirements (see paras 731, 736–737 & 741–744).

(25) **(per Mary Lim FCJ, concurring)** Reliance on the Immigration Act in this case was entirely misplaced. The Act dealt with matters of immigration and had no application to the appellant. It did not provide for or govern the matters claimed by the respondents such as the appellant's right to leave the country or to travel. It was intended to deal

with foreigners and their rights to enter, remain and leave Malaysia. As such, the issue of the validity of s 59 was best examined when the appropriate circumstances were present. The instant appeal was not such a circumstance. However, where the Immigration Act applied, the right to be heard was intrinsic to the whole fabric of the administration of justice as the rule of law demanded that there must always be fair play. The rules of fair play required an accused to be informed of the complaints against him and that he was given an opportunity to explain before a decision was taken. The actions or decisions of the respondents had to come under the supervisory jurisdiction of the courts. Parliament could not possibly leave subordinate bodies or authorities free to do as they pleased; that in making any decision concerning a citizen as to his right to depart the country, that person did not need to be heard. The contrary must be the correct position in law (see paras 746–747, 783 & 786).

(26) **(per Mary Lim FCJ, concurring)** The general powers of supervision and direction given to the first respondent by s 3(2) of the Immigration Act on all matters relating to immigration did not give him a power to ban travel by citizens for reasons unrelated to immigration or passports, such as in this case, scandalising or ridiculing the government — a matter which did not come within the purview of the original powers of the first respondent. There was no indication that the first respondent had acted on the instruction of some other authority. It was entirely his decision. The first respondent and the immigration officers were not police and did not have police powers under the Police Act 1963. They only had such powers as was expressly accorded to them under the Immigration Act or the Passports Act 1966 or under any other specific law. They had no right or authority to determine what conduct, action or speech of any person, including a citizen, would amount to an offence of disparaging the government. Hence, the first respondent's impugned decision was unlawful and clearly invalid. Within the procedural ambit of challenge, the respondents had themselves fatally failed to abide by their own procedure and applicable law (see paras 752, 767–768, 770 & 775–776).

(27) **(per Mary Lim FCJ, concurring)** The impugned decision was necessarily and more properly a decision under the Passports Act 1966 and not the Immigration Act since the appellant was barred from leaving the country because her international passport had been blacklisted. Even under the Passports Act, the impugned decision was bad in law as well as on the facts since s 2 of that Act had also been violated (see paras 755, 761–762 & 777).

(28) **(per Mary Lim FCJ, concurring)** Since s 59 (and for that matter s 59A) of the Immigration Act applied to Part VII of the Immigration Act and that it dealt with entry of persons into the East Malaysian States for which

there were special safeguards for the constitutional position of Sabah and Sarawak as provided in art 161E(4) of the FC, it would be highly improper to find s 59 invalid for the reasons articulated by the appellant; without more and certainly not without hearing those States. The East Malaysian States might well have their justifications and sound reasons for not affording an opportunity to be heard before a decision was made under any of the scenarios in s 65 of the Immigration Act. And since s 59 had application beyond the factual matrix of the appellant's case (which really was one not falling within the Immigration Act), the question whether s 59 was valid and constitutional had to be answered in the affirmative (see paras 792–793).

(29) **(per Mary Lim FCJ, concurring)** There was no reason to doubt the constitutionality of s 59A, even if for one moment the Immigration Act applied. Section 59A was not couched in absolute or total terms, offending art 4 or even art 121, of the FC. Its validity was saved by its own express limitations. The provision did not inhibit the power of the court to intervene, examine and/or set aside any decision made under the Immigration Act. The decision to ban the appellant from leaving the country was always subject to scrutiny by the court and s 59A implicitly recognised that. In any case, Parliament was entitled to enact s 59A under the powers of legislation as found in art 121 of the FC. Since the impugned decision was invalidated by reason of having failed to meet the procedural requirements as set; even if accepting those requirements were valid to start with, there was no need to examine further the validity and constitutionality of s 59A for the reasons articulated by the appellant (see paras 795–797 & 811).

[Bahasa Malaysia summary

Perayu, yang merupakan pengerusi sebuah organisasi bukan kerajaan ('NGO'), berada di Lapangan Terbang Antarabangsa Kuala Lumpur pada 15 Mei 2016 untuk menaiki penerbangan ke Korea Selatan apabila beliau telah dihalang berbuat demikian oleh pegawai imigresen. Mereka hanya memaklumkan kepada beliau, tanpa menyatakan alasan, bahawa beliau telah dilarang meninggalkan negara ini. Hanya apabila perayu memulakan proses semakan kehakiman untuk mencabar larangan perjalanannya, beliau telah mendapati bahawa atas arahan responden pertama, beliau disenarai hitam untuk meninggalkan negara ini selama tempoh tiga tahun bermula 6 Januari 2016 dengan alasan beliau telah memburukkan/memperlekeh Kerajaan Malaysia ('memburukkan Kerajaan Malaysia') dalam ucapan dan tindakannya di pelbagai forum dan perhimpunan. Responden telah menarik balik senarai hitam dan larangan perjalanan perayu dua hari selepas beliau dihalang meninggalkan negara ini pada 15 Mei 2016. Tujuan lawatan beliau ke Korea Selatan adalah untuk menghadiri persidangan hak asasi manusia antarabangsa di mana beliau seharusnya memberi ucapan dan menerima anugerah atas

kapasiti beliau sebagai anggota NGO. Permohonan semakan kehakiman perayu adalah berdasarakan kepada alasan bahawa keputusan untuk menghalangnya meninggalkan negara ini adalah tidak berasas, tidak wajar, tidak rasional dan tidak adil. Beliau menegaskan bahawa responden, atau salah satu daripadanya, telah: (a) bertindak melampaui bidang kuasa mereka kerana tidak ada peruntukan di bawah Akta Imigresen 1959/1963 ('Akta Imigresen') dan/atau sebarang undang-undang lain yang berkaitan untuk melarang seorang warganegara ke luar negara dalam keadaan yang serupa; (b) melanggar kebebasan asasi beliau berdasarkan perkara 5, 8 dan 10 Perlembagaan Persekutuan ('PP'); (c) melanggar prinsip keadilan semula jadi kerana tidak memberikan haknya untuk didengar; (d) melanggar syarat kewajaran prosedur dalam tidak memaklumkan beliau pada masa-masa larangan perjalanan dan alasan larangan tersebut; dan (e) bertindak tidak rasional dan mencabuli jangkaan sah beliau untuk pergi ke luar negara kerana beliau mempunyai pasport yang sah. Relif yang dipohon oleh perayu adalah, antara lain: (i) perintah certiorari untuk membatalkan keputusan responden untuk menghalangnya pergi ke luar negara; (ii) satu deklarasi bahawa keputusan yang dibantah tersebut melebihi bidang kuasa dan melanggar perkara 5, 8 dan 10 PP dan oleh itu adalah tidak berperlembagaan dan terbatal; (iii) satu deklarasi bahawa beliau tidak boleh dihalang hak untuk didengar di bawah s 59 Akta Imigresen; dan (iv) satu deklarasi bahawa ss 59 dan 59A (yang memperuntukkan bahawa tidak ada keputusan atau tindakan responden di bawah Akta Imigresen yang dapat disemak secara kehakiman kecuali apabila terdapat ketidakpatuhan terhadap apa-apa peruntukan prosedur) tidak berperlembagaan dan terbatal. Mahkamah Tinggi megguna pakai keputusan Mahkamah Persekutuan dalam *Government of Malaysia & Ors v Loh Wai Kong* [1979] 2 MLJ 33 ('Loh Wai Kong') dan menolak permohonan semakan kehakiman pada dasarnya dengan alasan bahawa warganegara tidak mempunyai hak perlembagaan untuk ke luar negara; oleh itu kerajaan mempunyai kuasa untuk menghalang seseorang warganegara keluar dari negara. Mahkamah juga berpendapat bahawa pihak responden tidak mempunyai kewajipan untuk memaklumkan kepada perayu mengenai alasan larangan perjalanannya dan s 59 telah dengan jelas memperuntukkan bahawa beliau tidak berhak untuk didengar sebelum larangan tersebut dikenakan. Mahkamah Rayuan ('MR') menolak rayuan perayu dengan alasan bahawa oleh kerana larangan perjalanan ke atasnya ditarik balik, rayuan tersebut adalah bersifat akademik dan hipotetikal. MR juga memutuskan bahawa di bawah s 59A Akta Imigresen, keputusan untuk melarang perayu meninggalkan negara ini jelas tidak dapat disemak secara kehakiman. Persoalan-persoalan yang dikemukakan kepada Mahkamah Persekutuan dalam rayuan semasa adalah: (1) sama ada s 3(2) Akta Imigresen memberikan budi bicara yang luas kepada Ketua Pengarah Imigresen untuk mengenakan larangan perjalanan ke atas seorang warganegara terutama sekiranya seseorang warganegara tersebut telah secara terbuka mengkritik atau memburukkan kerajaan; (2) sama ada s 59 adalah sah dan berperlembagaan; dan (3) sama ada s 59A tersebut sah dan

berperlembagaan berdasarkan keputusan Mahkamah Persekutuan dalam *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 ('Semenyih Jaya') dan *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 ('Indira Gandhi') kedua-dua kes tersebut menegakkan doktrin keagungan perlembagaan, pengasingan kuasa dan Kedaulatan Undang-Undang di Malaysia dan memutuskan bahawa walaupun terdapat pindaan pada perkara 121(1) PP pada tahun 1988, kuasa kehakiman terus berada pada Badan Kehakiman di bawah doktrin pengasingan kuasa dan tidak dapat dibatalkan atau dihapuskan walaupun melalui pindaan perlembagaan. Perayu juga bergantung kepada keputusan Mahkamah Persekutuan dalam *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 ('Alma Nudo Atenza') di mana panel sembilan anggota mengesahkan prinsip-prinsip perlembagaan yang dinyatakan dalam kedua-dua kes di atas dan memutuskan bahawa Parlimen tidak dapat menyingkirkan semakan kehakiman kerana doktrin pengasingan kuasa dan kebebasan badan kehakiman adalah struktur asas PP yang tidak dapat ditolak. Responden bergantung, antara lain, pada keputusan Mahkamah Persekutuan dalam *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72 ('Sugumar Balakrishnan') yang telah memutuskan bahawa ss 59 dan 59A Akta Imigresen adalah sah dan berperlembagaan. Dalam rayuan semasa, perayu berpendapat bahawa: (A) responden tidak mempunyai kuasa di bawah s 3(2) Akta Imigresen untuk melarangnya keluar dari negara ini; (B) bukan sahaja alasan larangan perjalanannya tidak pernah dimaklumkan kepada beliau pada bila-bila masa, tetapi alasan yang kemudian diberikan oleh responden untuk larangan tersebut tidak dapat dipertahankan; (C) responden telah, dengan sendirinya, mencipta kesalahan 'Memburukkan Kerajaan Malaysia' yang menetapkan hukuman dengan pengenaan larangan perjalanan; (D) larangan perjalanan tersebut melanggar kebebasan asasi berdasarkan perkara 5 dan 10 PP; (E) Pekeliling Jabatan Imigresen yang berkaitan dengan larangan perjalanan adalah tidak sah dan tidak terpakai berdasarkan undang-undang; dan (F) tindakan timbang tara oleh responden, gagal dalam ujian proporsionaliti dan tidak berperlembagaan. Pihak responden bergantungan kepada afidavit yang telah mereka failkan dalam prosiding semakan kehakiman yang, antara lain, menyatakan bahawa: (I) perayu disenarai hitam dan dilarang ke luar negara sejak 6 Januari 2016 (larangan tersebut ditarik balik pada 17 Mei 2016) kerana beliau (pada masa tersebut) mempunyai penglibatan dalam (a) forum 'People's Movement Can Bring Change' yang telah dijadualkan untuk diadakan pada 7 Januari 2016 dan (b) penganjuran tunjuk perasaan awam terhadap Anti-Trans Pacific Partnership Agreement yang dijadualkan pada 23 Januari 2016 — kedua-dua peristiwa tersebut berpotensi memburukkan Kerajaan Malaysia; (II) kerana 'kesalahan' memburukkan kerajaan, tempoh maksimum penggantungan pasport adalah tiga tahun tertakluk kepada budi bicara responden pertama untuk menarik balik larangan tersebut lebih awal; dan (III) pihak berkuasa tidak diwajibkan secara undang-undang untuk memaklumkan kepada perayu

A B C D E F G H I

mengenai larangan perjalanan sebelum ianya dikenakan.

Diputuskan, (a) sebulat suara mendapati bahawa responden pertama tidak mempunyai kuasa untuk mengenakan larangan perjalanan ke atas perayu dalam keadaan kes tersebut, dan (b) secara majoriti, berpendapat bahawa ss 59 dan 59A adalah sah dan berperlembagaan:

(1) **(oleh Tengku Maimun Ketua Hakim Negara, menentang)** *Semenyih Jaya* dan *Indira Gandhi* secara berkesan memutuskan bahawa pindaan terhadap perkara 121(1) PP sama sekali tidak menghalang kuasa kehakiman dan bahawa ia kekal diberikan hak pada Mahkamah Tinggi sejak Hari Kemerdekaan walaupun terdapat pindaan pada tahun 1988 kepada perkara 121. Justeru, perkara 121(1) mesti dibaca seperti sebelum pindaan tahun 1988 dan pindaan tersebut mesti ditafsirkan sebagai tidak mengurangkan atau merendahkan kuasa kehakiman kepada Parlimen atau mengisytiharkan Parlimen sebagai teragung. Dua kes yang disebutkan di atas juga telah menolak penghakiman Mahkamah Persekutuan dalam *Sugumar Balakrishan* bahawa oleh kerana perkara 121(1) telah dipinda yang sebagaimanya, Mahkamah sekarang seharusnya menegakkan klausa penyingkiran yang terkandung dalam undang-undang persekutuan. *Semenyih Jaya* dan *Indira Gandhi*, yang dipersetujui dan diikuti oleh panel sembilan anggota dalam *Alma Nudo Atenza*, memutuskan bahawa semakan kehakiman tidak dapat dikecualikan oleh mana-mana Akta Parlimen (lihat perenggan 74, 76–77, 80 & 235).

(2) **(oleh Tengku Maimun Ketua Hakim Negara, menentang)** Keagungan PP seperti yang dinyatakan dalam perkara 4(1) dan sumbernya pada kuasa kehakiman adalah ciri asas PP. Oleh itu, kuasa mahkamah untuk meneliti tindakan Negeri sama ada perundangan, eksekutif atau sebaliknya, tidak dapat dikecualikan. Pendapat responden bahawa mahkamah hanya dapat meneliti apa yang dibenarkan oleh Parlimen untuk diteliti harus ditolak kerana menegakkan keagungan Parlimen. Di bawah perkara 4(1), kesemua undang-undang adalah tertakluk kepada PP. Dan seperti yang diperoleh berdasarkan sejarah perundangan PP, perkara 4(1) bertujuan untuk merangkui kesemua tindakan, sama ada perundangan, eksekutif, kuasi-perundangan, kuasi-kehakiman, dan lain-lain. Dengan wujudnya perlembagaan bertulis yang mengisytiharkannya sebagai sumber teragung undang-undang, kaedah Inggeris untuk menyelesaikan kesahan klausa penyingkiran hanya berdasarkan penggubalan undang-undang, seperti yang dicadangkan oleh responden, tidak dapat diguna pakai. Seksyen 59A mesti dinilai dari sudut yang lebih besar sama ada klausa penyingkiran secara keseluruhannya sah dari segi perlembagaan berdasarkan perkara 4(1). Badan Perundangan tidak dapat menolak semakan kehakiman sepenuhnya atau melarang hak untuk remedi sejauh mana proses

semakan kehakiman dianggap sia-sia (lihat perenggan 81–83 & 125–126). A

(3) **(oleh Tengku Maimun Ketua Hakim Negara, menentang)** Badan Kehakiman adalah badan yang ditugaskan untuk menafsirkan undang-undang di bawah perkara 121(1) dan oleh yang demikian merupakan medium di mana perkara 4(1) beroperasi. Peruntukan ini membentuk struktur asas PP. Kesan gabungan kedua-dua perkara tersebut adalah bahawa klausa penyingkiran tidak akan dapat menyingkirkan, mengurangkan atau mengecualikan kuasa kehakiman mahkamah dan jenteranya, semakan kehakiman — tidak kira seberapa bijak dan luas ianya dibuat, dan tidak kira sama ada ianya dengan sengaja mengecualikan semakan kehakiman atau sebahagian remedi. Oleh kerana s 59A menghadkan bukan sahaja skop semakan kehakiman tetapi remedi yang mungkin akan dibenarkan, ianya adalah tidak sah dan tidak berperlembagaan (lihat perenggan 89 & 98–99). B C D

(4) **(oleh Tengku Maimun Ketua Hakim Negara, menentang)** Tidak ada apa-apa dalam Pekeliling responden yang menyarankan, walaupun secara tipis, bahawa responden mempunyai kuasa untuk menyenarai hitam seseorang yang mempunyai pasport yang sah selain dari situasi fakta khusus di mana mereka kehilangan pasport mereka. Ia adalah tidak jelas di bawah undang-undang bertulis apa Pekeliling tersebut wujud. Tidak ada apa di dalamnya yang membenarkan responden untuk mengenakan larangan perjalanan ke atas perayu berdasarkan alasan yang dikemukakan dalam kes ini (lihat perenggan 135–136). E F

(5) **(oleh Tengku Maimun Ketua Hakim Negara, menentang)** Keputusan Mahkamah Persekutuan dalam *Loh Wai Kong* adalah bahawa hak untuk berjalan ke luar negara adalah hak keistimewaan dan bukannya hak asasi bukanlah duluan yang mengikat kerana: (a) isu dalam kes tersebut adalah keengganan kerajaan untuk memperbaharui pasport dan bukan pengenaan larangan perjalanan ke atas warganegara yang memiliki pasport yang sah; (b) keputusan mahkamah telah dibuat tanpa bidang kuasa kerana ia melanggar prinsip bahawa pihak hanya boleh merayu terhadap keputusan mahkamah dan bukan alasan untuk penghakiman atau apa-apa 'pernyataan' atau 'dapatan' dalam penghakiman (lihat perenggan 148–147). G H

(6) **(oleh Tengku Maimun Ketua Hakim Negara, menentang)** Pada pembacaan secara prismatik dan bertujuan perkara 5(1) PP dan berdasarkan kepada otoriti agung dan fakta bahawa PP adalah dokumen hidup dan organik, 'kebebasan diri' dalam perkara 5(1) PP meliputi hak untuk berjalan ke luar negara. Hak asasi perayu untuk berjalan ke luar negara oleh itu telah dilanggar dan pendapat responden bahawa ss 3(2) dan 4 Akta Imigresen yang membenarkan mereka mengenakan larangan perjalanan tidak dapat diterima pakai berdasarkan penggubalan I

kedua-dua seksyen tersebut secara literal. Kuasa untuk mengenakan larangan perjalanan pada perjalanan antarabangsa juga tiada di bawah Akta Pasport 1966. Tanpa peruntukan undang-undang yang positif yang menetapkan dengan jelas dan terang hak responden untuk mengenakan larangan perjalanan, tindakan mereka dalam melakukannya adalah tidak sah (lihat perenggan 172–176, 178 & 181–182).

(7) **(oleh Tengku Maimun Ketua Hakim Negara, menentang)** Seksyen 59 dengan jelas mengecualikan keadilan semula jadi (hak untuk didengar) dan oleh itu bertujuan untuk mengecualikan keadilan prosedur yang dijamin oleh perkara 5(1) dan 8(1) PP. Ia dengan itu adalah tidak sah dan tidak berperlembagaan. Walaupun sekiranya Parlimen telah menyatakan niatnya untuk mengecualikan hak untuk didengar secara teramat jelas dalam s 59, peruntukan tersebut tidak bersesuaian dengan 'sistem undang-undang' kita yang secara berperlembagaan menetapkan keadilan prosedur (lihat perenggan 197 & 218).

(8) **(oleh Nallini Pathmanathan HMP, menentang)** Kuasa kehakiman dalam perkara 121(1) harus dibaca tertakluk kepada perkara 4(1) yang merupakan perkara utama yang menentukan sifat dan tahap kuasa kehakiman. Perkara 121(1) tidak seharusnya ditafsirkan secara berasingan. Titik permulaan dalam penggubalan kuasa kehakiman dalam perkara 121(1) mestilah perkara 4(1) kerana bukan hanya ia mengisytiharkan PP sebagai undang-undang teragung negara tetapi memberi kuasa kepada Badan Kehakiman untuk membatalkan undang-undang pasca-Merdeka yang tidak selari dengan PP setakatmana ianya tidak ada keselarian. Oleh kerana hanya Mahkamah Tinggi yang dapat menjalankan fungsi ini, ia mengikuti perkara 4(1) yang telah menetapkan hak perlembagaan semakan kehakiman. *Sugumar Balakrishnan*, yang menegakkan perlembagaan s 59A, tidak lagi menjadi undang-undang yang baik kerana gagal mempertimbangkan hak perlembagaan semakan kehakiman dalam perkara 4(1) (lihat perenggan 389).

(9) **(oleh Nallini Pathmanathan HMP, menentang)** Kuasa perlembagaan semakan kehakiman dalam perkara 4(1) adalah ciri asas atau penting PP yang tidak dapat dipinda, dibatalkan atau dihapuskan oleh mana-mana undang-undang atau pindaan perlembagaan. Tidak ada undang-undang yang dapat mengatasi atau menghalang bidang kuasa yang ditetapkan secara berperlembagaan ini. Perkara 4(1) dengan itu menetapkan Peraturan Undang-Undang dan doktrin pengasingan kuasa dan merangkumi keseluruhan asas bagi ketiga-tiga badan kerajaan untuk berfungsi. Jika perkara 121(1) perlu dibaca secara harfiah untuk menafsirkan bidang kuasa dan kuasa Mahkamah Tinggi adalah terhad setakatmana yang ditetapkan oleh undang-undang persekutuan, bagaimana mahkamah dapat melaksanakan peruntukan 4(1) untuk

menolak mana-mana undang-undang persekutuan yang tidak selari dengan PP apabila kuasa mahkamah untuk menyemak undang-undang tersebut telah disingkirkan oleh undang-undang persekutuan yang sama? (lihat perenggan 269 & 389).

(10) **(oleh Nallini Pathmanathan HMP, menentang)** Berdasarkan asas perkara 4(1) sahaja, s 59A tidak dapat wujud dan terbatal. Dengan mengecualikan semakan kehakiman sama sekali, kecuali untuk hal-hal prosedur sahaja, s 59A melanggar kuasa kehakiman dengan melanggar perkara 4(1) yang membenarkan kesemua peruntukan undang-undang diperiksa secara keseluruhan untuk kesahan perlembagaan (lihat perenggan 271–275)

(11) **(oleh Nallini Pathmanathan HMP, menentang)** Hak untuk berjalan ke luar negara adalah hak asasi yang termasuk dalam 'hak untuk hidup' dalam perkara 5(1) PP dan hak tersebut hanya dapat dikurangkan bersesuaian dengan undang-undang yang adil, saksama, selari dan wajar dan tidak sewenang-wenang dan tidak berubah-ubah baik secara substansial dan prosedur. Responden telah melanggar hak tersebut dengan menghalang perayu untuk ke luar negara walaupun beliau mempunyai pasport yang sah. Seksyen 3(2) Akta Imigresen dengan cara apa pun tidak memberi kuasa kepada responden untuk menyenarai hitam atau melarang perayu untuk berjalan ke luar negeri dengan alasan beliau telah memburukkan imej kerajaan atau negara. Akibat daripada menghalang perayu untuk pergi ke luar negara, responden juga telah melanggar haknya untuk kebebasan bersuara dan menyatakan pendapat berdasarkan perkara 10 PP (lihat perenggan 393–394, 404, 406 & 409–410).

(12) **(oleh Nallini Pathmanathan HMP, menentang)** Oleh kerana s 59 menafikan perayu pada keadilan semula jadi (iaitu hak untuk didengar), ia adalah bertentangan dengan perkara 5(1) PP dan adalah tidak sah (lihat perenggan 426–439).

(13) **(oleh Abdul Rahman Sebli HMP, majoriti)** Seksyen 59 dan 59A adalah tidak terbatal kerana tidak selaras dengan perkara 4(1) yang dibaca bersama perkara 121(1) PP. Had kuasa semakan mahkamah berdasarkan s 59A sepenuhnya berada dalam kuasa Parlimen untuk menggubal perundangan berdasarkan kuasa yang diberikan kepadanya melalui perkara 121(1) PP dan tidak melanggar doktrin pengasingan kuasa, yang tidak dapat, dalam apa jua keadaan, mengatasi PP (lihat perenggan 694).

(14) **(oleh Abdul Rahman Sebli HMP, majoriti)** Doktrin keagungan perlembagaan tidak membenarkan doktrin undang-undang untuk melangkaui atau mendahului ketetapan bertulis PP, seperti yang dinyatakan oleh perkara 4(1) PP, adalah undang-undang utama dan teragung di negara ini. Apa pun yang boleh ditafsirkan sebagai

sebahagian daripada 'struktur asas' PP, tidak ada pendapat bahawa undang-undang pasca-Merdeka hanya akan diisytiharkan terbatal di bawah perkara 4(1) sekiranya tidak selari dengan PP dan tanpa alasan lain. Dalam kes semasa, persoalannya adalah sama ada s 59A (menjadi undang-undang pasca-Merdeka) tidak selari dengan perkara 121(1) dan bukan sama ada ianya tidak selari dengan doktrin undang-undang tidak kira betapa hebatnya doktrin undang-undang tersebut. Walau bagaimanapun, doktrin undang-undang tidak dapat mengatasi PP (lihat perenggan 597 & 692–693).

(15) **(oleh Abdul Rahman Sebli HMP, majoriti)** Tidak selari dengan PP bererti tidak selari dengan kesemua perkara PP yang berkaitan dengan skema perundangan dari undang-undang yang dibantah tersebut. Skema perundangan s 59A adalah untuk memberikan had kepada kuasa semakan kehakiman Mahkamah Tinggi terhadap ketidakpatuhan prosedur oleh pembuat keputusan. Jelas, hal itu berada dalam kebijaksanaan Parlimen untuk menggubal perundangan berdasarkan kuasa yang diberikan kepadanya melalui perkara 121(1). Oleh itu, s 59A tidak terbatal di bawah perkara 4(1) kerana tidak selari dengan perkara 121(1) PP (lihat perenggan 471).

(16) **(oleh Abdul Rahman Sebli HMP, majoriti)** *Sugumar Balakrishnan* adalah autoriti melangkaui mengenai kesahan perlembagaan ss 59 dan 59A dan bukannya *Semenyih Jaya*, *Indira Gandhi* atau *Alma Nudo Atenza* kerana ini adalah kes yang secara langsung berkaitan dengan kesahan kedua-dua seksyen tersebut. *Semenyih Jaya*, *Indira Gandhi* dan *Alma Nudo Atenza* sama sekali tidak berkaitan dengan kesahan perlembagaan ss 59 dan 59A oleh itu tidak ada persoalan mengenai keputusan dalam *Sugumar Balakrishnan* 'flying in the face' terhadap keputusan dalam ketiga-tiga kes tersebut (lihat perenggan 70–71 & 67).

(17) **(oleh Abdul Rahman Sebli HMP, majoriti)** Tidak dipertikaikan bahawa s 59A digubal berdasarkan perkara 121(1) PP. Ianya adalah perkara ini dan bukan perkara lain yang menetapkan kuasa kehakiman Persekutuan dalam mahkamah. Seksyen 59A tidak digubal berdasarkan kepada perkara PP lain yang mungkin tidak selari dan oleh itu terbatal di bawah perkara 4(1). Perayu sepertinya berpendapat bahawa s 59A tidak sah bukan kerana ianya tidak selari dengan perkara 121(1) tetapi kerana ianya tidak selari dengan perkara 5(1), 8(1) dan 10(1) PP — walaupun tidak ada sebarang rujukan dibuat terhadap perkara ini dalam persoalan kebenaran. Perkara ini tidak ada kewajaran terhadap isu di hadapan mahkamah, iaitu sama ada Parlimen diberi kuasa oleh perkara 121(1) untuk menggubal s 59A. Jawapan untuk persoalan ini bergantung pada sama ada Parlimen telah bertindak dalam kerangka perlembagaan perkara 121(1) ketika menggubal s 59A dan bukan sama ada seksyen tersebut tidak sah kerana tidak selari dengan perkara 5(1), 8(1) atau

10(1). Jelas, penggubalan s 59A dibenarkan oleh perkara 121(1), lalu menjadikannya klausa penyingkiran yang sah. Klausa penyingkiran yang sah tidak dapat ditolak di bawah perkara 4(1) PP (lihat perenggan 513–517).

(18) **(oleh Abdul Rahman Sebli HMP, majoriti)** Perkara 4(1) melindungi keagungan PP dan mula diguna pakai apabila terdapat ketidakselarian antara undang-undang pasca-Merdeka dan PP dan ketidakselarian tersebut tidak dapat diselaraskan berdasarakan ketetapan selari perkara PP. Perkara 4(1) tidak ada hubungannya dengan kuasa kehakiman Persekutuan. Kuasa kehakiman Persekutuan diperuntukan oleh perkara 121(1) dan bukan oleh perkara 4(1) atau perkara PP lain (lihat perenggan 518).

(19) **(oleh Abdul Rahman Sebli HMP, majoriti)** Perkara 4(1) dapat membatalkan s 59A hanya sekiranya ia tidak selari dengan ketetapan perlembagaan yang memberikannya kesahan dan kekuatan atau undang-undang. Ianya hanya perkara 121(1) PP, dan tidak ada perkara lain, yang memberikan kesahan dan kekuatan undang-undang 59A. Atas sebab itu, s 59A hanya boleh terbatal sekiranya ia tidak selari dengan perkara 121(1) dan tidak dengan perkara PP lain yang tidak ada berkaitan dengan kuasa Parlimen untuk menggubal undang-undang persekutuan menurut perkara 121(1). Perayu tidak menunjukkan bagaimana s 59A tidak selari dengan perkara 121(1) selain mengatakan bahawa ianya melanggar doktrin pengasingan kuasa, yang menurutnya adalah 'struktur asas' PP (lihat perenggan 518 & 590).

(20) **(oleh Abdul Rahman Sebli HMP, majoriti)** Perkara 4(1) tidak dapat diguna pakai untuk menolak undang-undang pasca-Merdeka yang tidak selari dengan sebarang perkara PP. Perkara yang tidak selari dengan undang-undang pasca-Merdeka harus berkaitan dengan perkara pokok dan skema perundangan terhadap undang-undang yang dibantah tersebut yang dipohon untuk diisytiharkan terbatal di bawah perkara 4(1). Demikian juga, perkara 4(1) tidak boleh diguna pakai untuk menolak undang-undang yang tidak selari dengannya kerana perkara 4(1) tidak beroperasi dengan sendirinya dan secara sendirinya tetapi merupakan mekanisme untuk mengisytiharkan undang-undang pasca-Merdeka tidak sah kerana tidak selari dengan perkara PP lain yang relevan (lihat perenggan 521–523).

(21) **(oleh Abdul Rahman Sebli HMP, majoriti)** Sumber kuasa kehakiman dalam Persekutuan adalah perkara 121(1) PP dan bukan perkara lain. Tanpa perkara 121(1), mahkamah tidak akan mempunyai kuasa kehakiman untuk menjalankannya. Perkara PP lain tidak memberikan kuasa kehakiman kepada mahkamah. Ini adalah istilah perkara 121(1) bahawa mahkamah mempunyai bidang kuasa dan kuasa 'sebagaimana yang diberikan oleh atau di bawah undang-undang persekutuan'. Dalam

kes semasa, undang-undang persekutuan, melalui s 59A, telah menyatakan dengan jelas bahawa kedua-dua Mahkamah Tinggi hanya dapat menyemak ketidakpatuhan prosedur dan bukan keputusan substantif pembuat keputusan. Sekiranya kedua-dua mahkamah mengabaikan had yang ditetapkan oleh s 59A atas nama pengasingan kuasa dan kebebasan kehakiman, ia akan menentang perkara 121(1) PP, yang ia tidak mempunyai kuasa untuk berbuat demikian (lihat perenggan 524 & 528–531).

(22) **(oleh Abdul Rahman Sebli HMP, majoriti)** Sebagaimana peruntukan yang menetapkan kuasa kehakiman Persekutuan, perkara 121(1) tidak seharusnya diturunkan kepada mana-mana doktrin perundangan, termasuklah doktrin struktur asas India dan doktrin common law mengenai pengasingan kuasa. Tidak ada sebarang doktrin undang-undang yang dapat mengatasi perkara 121(1) yang telah menetapkan dalam bahasa yang jelas bahawa bidang kuasa dan kuasa Mahkamah Tinggi dan mahkamah rendah adalah 'sebagaimana yang diberikan oleh atau di bawah undang-undang persekutuan'. Persoalan mengenai istilah undang-undang tertinggi ini yang bertentangan dengan doktrin pengasingan kuasa tidak berbangkit (lihat perenggan 562).

(23) **(oleh Abdul Rahman Sebli HMP, majoriti)** Seksyen 3(2) Akta Imigresen telah dengan jelas memberikan responden pertama kuasa yang luas atas 'kesemua perkara yang berkaitan dengan imigresen'. Fakta bahawa responden yang telah memberikan alasan yang salah dan tidak sah dalam mengenakan larangan perjalanan ke atas perayu sama sekali tidak mengubah fakta bahawa dalam undang-undang mereka tidak mempunyai kewajipan untuk memberikan sebarang alasan. Oleh itu, walaupun responden pertama telah dengan salah bergantungan kepada pekeliling jabatan yang tidak memiliki kuasa undang-undang untuk mengenakan larangan perjalanan, perkara itu tidak mengubah keputusannya menjadi tindakan yang salah jika sebaliknya keputusan tersebut dibenarkan oleh undang-undang, keputusan yang mana tidak diperuntukan bagi hak untuk didengar di bawah s 59 dan tidak diperuntukan untuk semakan kehakiman di bawah s 59A. Berdasarkan kekuatan keputusan Mahkamah Persekutuan dalam *Loh Wai Kong*, jika ianya bukan hak perlembagaan bagi seorang warganegara untuk meninggalkan negara ini untuk ke luar negara, maka ianya tidak boleh menjadi pelanggaran undang-undang bagi responden untuk menjatuhkan larangan perjalanan kepada warganegara. Untuk mengatakan bahawa responden pertama tidak mempunyai kuasa untuk mengenakan larangan perjalanan di bawah s 3(2) Akta Imigresen adalah jelas salah. Walau bagaimanapun, berdasarkan fakta dan keadaan ganjil kes ini, alasan yang diberikan oleh responden pertama untuk mengenakan larangan perjalanan ternyata tidak wajar (lihat perenggan 624, 627, 695 & 644–646).

(24) **(oleh Mary Lim HMP, bersetuju)** Penjelasan oleh responden mengenai larangan perjalanan dan Pekeliling Jabatan yang mereka bergantungan mempunyai beberapa kesilapan yang serius. Pada masa pihak responden menyenarai hitam perayu, kejadian yang dituduh yang disertai oleh beliau masih belum berlaku. Berdasarkan termanya sendiri, Pekeliling tersebut bukan sahaja tidak membenarkan responden menyenarai hitam perayu sama ada atas alasan yang dicadangkan atau sama sekali, tetapi ianya adalah tidak sah dan tidak mempunyai kuasa undang-undang. Tidak ada perkara yang dinyatakan dalam Surat Pekeliling boleh diguna pakai terhadap perayu. Oleh itu, berdasarkan kekuatan Pekeliling tersebut sendiri, keputusan yang dibantah tersebut jelas tidak sah dan bertentangan dengan kehendak prosedurnya sendiri (lihat perenggan 731, 736–737 & 741–744).

(25) **(oleh Mary Lim HMP, bersetuju)** Kebergantungan kepada Akta Imigresen dalam kes ini jelas sekali salah. Akta tersebut menangani perkara berkaitan imigresen dan tidak boleh diguna pakai terhadap perayu. Ia tidak memperuntukan atau menetapkan perkara yang dituntut oleh responden seperti hak perayu untuk meninggalkan negara atau melancong. Ia adalah bertujuan untuk berurusan dengan orang asing dan hak mereka untuk masuk, menetap dan meninggalkan Malaysia. Oleh yang demikian, isu kesahan s 59 lebih baik untuk diperiksa apabila wujudnya keadaan yang bersesuaian. Rayuan semasa bukanlah keadaan seperti itu. Akan tetapi, apabila Akta Imigresen diguna pakai, hak untuk didengar adalah hakiki kepada keseluruhan struktur perlaksanaan keadilan kerana peraturan undang-undang menuntut agar selalu berlaku adil. Peraturan *fair play* menghendaki seorang tertuduh dimaklumkan mengenai pertuduhan terhadapnya dan bahawa beliau diberi peluang untuk menjelaskan sebelum keputusan dapat diambil. Tindakan atau keputusan responden harus berada di bawah bidang kuasa seliaan Mahkamah. Parlimen tidak mungkin membiarkan badan bawahan atau pihak berkuasa bebas melakukan sesuatu sesuka hati; bahawa dalam membuat sebarang keputusan mengenai warganegara mengenai haknya untuk meninggalkan negara, seseorang itu tidak seharusnya perlu didengar. Keadaan yang bertentangan mestilah kedudukan undang-undang yang betul (lihat perenggan 746–747, 783 & 786).

(26) **(oleh Mary Lim HMP, bersetuju)** Kuasa umum seliaan dan arahan yang diberikan kepada responden pertama oleh s 3(2) Akta Imigresen mengenai kesemua perkara yang berkaitan dengan imigresen tidak memberinya kuasa untuk melarang perjalanan oleh warganegara dengan alasan yang tidak berkaitan dengan imigresen atau pasport, seperti dalam kes ini, memalukan atau memburukkan kerajaan — suatu perkara yang tidak termasuk dalam bidang kuasa asal responden pertama. Tidak ada indikasi bahawa responden pertama telah bertindak atas arahan beberapa

pihak berkuasa lain. Ia adalah keputusannya sepenuhnya. Responden pertama dan pegawai imigresen bukanlah polis dan tidak mempunyai kuasa polis di bawah Akta Polis 1963. Mereka hanya mempunyai kuasa seperti yang jelas diberikan kepada mereka di bawah Akta Imigresen atau Akta Pasport 1966 atau di bawah undang-undang khusus lain. Mereka tidak memiliki hak atau kuasa untuk memutuskan apakah tingkah laku, tindakan, atau pertuturan seseorang, termasuk warganegara, yang akan dianggap sebagai kesalahan memburukkan kerajaan. Oleh itu, keputusan responden pertama yang dibantah adalah tidak mengikut undang-undang dan jelas tidak sah. Dalam lingkungan prosedur bantahan, responden sendiri telah dengan serius gagal mematuhi prosedur mereka sendiri dan undang-undang yang terpakai (lihat perenggan 752, 767–768, 770 & 775–776).

(27) **(oleh Mary Lim HMP, bersetuju)** Keputusan yang dibantah tersebut adalah semestinya dan lebih tepat adalah keputusan di bawah Akta Pasport 1966 dan bukan Akta Imigresen kerana perayu dilarang meninggalkan negara ini kerana pasport antarabangsa miliknya telah disenarai hitam. Walaupun di bawah Akta Pasport, keputusan yang dibantah tersebut adalah tidak sah dari segi undang-undang dan juga fakta oleh kerana s 2 Akta tersebut juga telah dilanggar (lihat perenggan 755, 761–762 & 777).

(28) **(oleh Mary Lim HMP, bersetuju)** Oleh kerana s 59 (dan untuk perkara tersebut s 59A) Akta Imigresen terpakai untuk Bahagian VII Akta Imigresen dan bahawa ia menangani kemasukan seseorang ke Negeri-Negeri Timur Malaysia yang mana terdapat perlindungan khas untuk kedudukan perlembagaan Sabah dan Sarawak seperti yang diperuntukkan dalam perkara 161E(4) PP, ia adalah sangat tidak wajar untuk membuat dapatan bahawa s 59 tidak sah atas alasan yang dinyatakan oleh perayu; lebih lagi dan pasti tanpa mendengar Negeri-negeri tersebut. Negeri-negeri Malaysia Timur mungkin mempunyai justifikasi dan alasan yang kukuh untuk tidak membenarkan peluang untuk didengar sebelum keputusan dibuat di bawah mana-mana situasi dalam s 65 Akta Imigresen. Dan kerana s 59 mempunyai pemakaian di luar fakta matrik kes perayu (yang sebenarnya tidak termasuk dalam Akta Imigresen), persoalan sama ada s 59 tersebut adalah sah dan berperlembagaan harus dijawab secara afirmatif (lihat perenggan 792–793).

(29) **(oleh Mary Lim HMP, bersetuju)** Tidak ada sebarang alasan untuk meragukan perlembagaan s 59A, walaupun untuk satu tempoh Akta Imigresen terpakai. Seksyen 59A tidak dinyatakan secara terma mutlak atau muktamad, yang bertentangan dengan perkara 4 atau bahkan perkara 121, PP. Kesahihannya diselamatkan oleh had tersuratnya sendiri. Peruntukan tersebut tidak menghalang kuasa mahkamah untuk

campur tangan, memeriksa dan/atau mengetepikan keputusan yang dibuat di bawah Akta Imigresen. Keputusan untuk menghalang perayu meninggalkan negara ini selalunya tertakluk oleh pemeriksaan mahkamah dan s 59A secara tersirat mengakuinya. Namun begitu, Parlimen berhak menggubal s 59A di bawah kuasa perundangan seperti yang terdapat dalam perkara 121 PP. Oleh kerana keputusan yang dibantah tersebut dibatalkan kerana tidak memenuhi syarat prosedur seperti yang ditetapkan; walaupun dalam memenuhi syarat-syarat tersebut ianya pada asalnya adalah sah, tidak ada keperluan selanjutnya untuk meneliti kesahihan dan perlembagaan s 59A atas alasan yang dinyatakan oleh perayu (lihat perenggan 795, 797 & 811).]

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Gurdial Singh Nijar (Lim Wei Jiet, Abraham Au and Joshua Andran with him) (Seenevasan) for the appellant.
Shamsul Bolhassan (Liew Horng Bin with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Tengku Maimun Chief Justice (delivering dissenting judgment of the court):

INTRODUCTION

[1] This appeal brings to the fore, once again, the sacrosanct doctrine of separation of powers which is an immutable feature of all democratic nations. Tied to the discussion is what some call the trilogy of cases comprising the recent judgments of this court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 ('Semenyih Jaya'), *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 ('Indira Gandhi') and *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 ('Alma Nudo').

BACKGROUND FACTS

[2] The appellant, Maria Chin Abdullah, was to receive the 2016 Gwanju Prize from the South Korean May 18th Memorial Foundation. She was expected to travel to South Korea on 15 May 2016 to receive the prize, and to deliver a speech on the occasion of the ceremony.

[3] On 15 May 2016, the appellant, in her attempt to board flight MH66 to South Korea, was stopped by the immigration authorities at Kuala Lumpur International Airport after she checked in and collected her boarding pass. She was informed by the authorities just before boarding that she was restricted from travelling abroad as a travel ban had been imposed on her. No reasons were communicated to her for the ban either before or after.

PROCEEDINGS IN THE COURTS BELOW

[4] The appellant filed an application for judicial review in the High Court against the Director General of Immigration as the first respondent and the Minister of Home Affairs as the second respondent, seeking the following prayers:

(1) An order of *certiorari* to quash the decision made by the respondents to blacklist the appellant from travelling overseas, which was brought to the appellant's attention on the day she was scheduled to leave Malaysia on 15.5.2016 ('Impugned Decision');

(2) A *declaration* that the Impugned Decision made by the respondents to blacklist the appellant from travelling overseas in the circumstances is a breach of Article 5(1), Article 8(1) and/or Article 10(1)(a) of the Federal Constitution and is as a result, unconstitutional and void;

(3) A *declaration* that the respondents do not have the power to make the Impugned Decision and therefore acted in excess of jurisdiction;

(4) A *declaration* that the respondents do not have an unfettered discretion to arrive at the Impugned Decision;

(5) A *declaration* that the respondents cannot act under section 59 of Act 155 to deny the appellant a right to natural justice as this is in violation of the Federal Constitution in particular Article 160 read together with Article 4 of the Federal Constitution and relevant case law;

(6) A *declaration* that the following provisions of Act 155 are unconstitutional:

(a) section 59 which excludes the right to be heard; and/or

(b) section 59A which excludes judicial review.

(7) An order of *prohibition* to prevent the respondents from making any subsequent decisions to blacklist the appellant from travelling overseas in similar circumstances; and

(8) In the alternative to (7), an order of *prohibition* to prevent the respondents from making any subsequent decisions to blacklist the appellant from travelling overseas without furnishing her with reasons and according her a right to be heard.

[5] In opposing the appellant's judicial review application, the respondents averred that a three-year travel ban beginning 6 January 2016 was imposed on the appellant for the reasons that she had made comments 'disparaging the Malaysian Government' on 7 January 2016 at a forum called 'People's Movement Can Bring Change' and/or on 23 January 2016 at an allegedly illegal assembly of 'Anti Trans-Pacific Partnership Agreement Protest'. At this juncture, I note that the ban seemed to have taken effect prior to the two events taking place.

[6] The respondents also averred that the ban was imposed under the authority of 'Pekeliling Imigresen Malaysia Terhad Bil 3 Tahun 2015' ('Circular').

[7] The High Court, satisfied that the ban was valid, dismissed the appellant's judicial review application principally on the ground that it was bound by the decision of the former Federal Court in *Government of Malaysia & Ors v Loh Wai Kong* [1979] 2 MLJ 33 ('*Loh Wai Kong* (FC)') which purportedly decided that the government has the right to restrict the international travel of citizens.

[8] Dissatisfied with the decision of the High Court, the appellant appealed to the Court of Appeal.

[9] The Court of Appeal upheld the order of the High Court not on the merits, but on the ground that the appeal was rendered academic by virtue of the ban having since been lifted.

PROCEEDINGS IN THE FEDERAL COURT

[10] The appellant was granted leave by this court to appeal on the following questions of law:

Question 1

Whether section 3(2) of the Immigration Acts 1959/63 ('Act 155') empowers the Director General with unfettered discretion to impose a travel ban? In particular, can the Director General impose a travel ban for reasons that impinge on the democratic rights of citizens such as criticising the Government?

Question 2

Whether section 59 of Act 155 is valid and constitutional? *Question 3*

Whether section 59A of Act 155 is valid and constitutional in the light of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 ('Semenyih Jaya') and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 ('Indira Gandhi')?

Preliminary objection

[11] At the outset of the hearing, learned senior federal counsel ('SFC') raised a preliminary objection that the appeal is academic; that there is no live issue and that the judgment of this court would not serve any useful purpose as the travel ban imposed on the appellant had been lifted. Learned SFC argued that the appeal should be dismissed on that ground.

[12] In response, it was submitted by learned counsel for the appellant that the issue of whether the appeal is academic was ventilated at the leave stage and was rejected, as apparent in the decision of the leave panel on 19 February 2019 granting the appellant leave to appeal. Learned counsel further submitted that the issue is therefore res judicata and any attempt to re-litigate the issue is in effect an attempt to persuade this court to reverse the leave panel's decision.

[13] Upon hearing parties' respective submissions, we dismissed the preliminary objection and proceeded to hear the appeal on the merits. Our reasons on the preliminary objection are as follows.

[14] We were of the view that the appeal is not academic. It is settled law that where a leave panel has decided a certain issue, a subsequent panel hearing the appeal proper should be mindful not to reverse it (see *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513; and *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Mohd Sobri bin Che Hassan* [2020] 4 MLJ 620; [2020] 1 CLJ 595). At the hearing of the leave application, the respondents maintained that not only the appeal, but the entire matter was academic even at the High Court. The leave panel was obviously unpersuaded by the respondents' argument because it nonetheless granted leave to appeal. We were not prepared to reverse that decision.

[15] On the judgment of this court in *Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-Peguam Muslim Malaysia, intervener) and another appeal* [2020] 4 MLJ 773; [2018] 10 CLJ 129 ('Bar Council'), which was relied upon by the respondents for the proposition that the Federal Court does not entertain academic and hypothetical appeals, with respect, it was our considered view that the judgment did not advance the respondents' case very far.

[16] The facts in *Bar Council* were materially different. The matter was a reference under s 84 of the Courts of Judicature Act 1964 ('the CJA 1964') and was thus to be decided by the Federal Court on the merits for the first time. By the time the Federal Court assembled to pronounce judgment, the relevant judges whose appointments were in dispute had left the Bench rendering the issue of their appointments *ipso facto* academic. The present case is materially different because the High Court upheld the travel ban. There is therefore in this case a valid lis live for adjudication.

[17] Further, this court in *Bar Council* accepted the observations of Lord Slynn of Hadley in *Regina v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450 ('Salem') that courts should not usually hear 'academic' cases 'unless there is a good reason in the public interest for doing so' (*Salem*, p 457). This, in the court's words, is the '*Salem* exception' to the rule

disfavouring the hearing of academic cases.

[18] It will be noticed that the *Salem* exception is in accord with the language of s 96(a) of the CJA 1964 whereby leave to appeal to the Federal Court shall be granted, inter alia, on 'a question of importance upon which further argument and a decision of the Federal Court would be to public advantage'. The points of law in this case are not novel (the other limb of s 96(a) of the CJA 1964), neither do they singularly concern constitutional points (s 96(b) of the CJA 1964). It follows that in granting leave, the leave panel viewed the case as having public importance, and accordingly, that it satisfied the *Salem* exception.

Merits of the appeal

[19] I have read the majority judgment in draft of my learned brother Abdul Rahman bin Sebli FCJ and my learned sister Mary Lim Thiam Suan FCJ but with greatest regret I am unable to agree with their reasoning and conclusions in respect of questions 2 and 3.

[20] For coherence and given the line of argument, I will first address question 3 which deals with the extent and scope of judicial power of the courts in this country. question 1 will be discussed next as it is directly relevant to the substantive material issue of the travel ban and naturally, question 2 will be addressed last.

[21] In this judgment, the Federal Constitution will be referred to as 'FC', Immigration Acts 1959/63 as 'Act 155', the Passports Act 1966 as 'Act 150' and the Rules of Court 2012 as 'ROC 2012'.

FINDINGS/DECISION

Question 3

[22] Question 3 concerns the issue whether s 59A of Act 155 is unconstitutional. A larger poser arising from question 3 is whether ouster clauses are, as a whole, invalid. Without being unduly technical, although the question reads '... in the light of *Semenyih Jaya* and *Indira Gandhi* ...', the crux of the question posed concerns judicial power/judicial review. Learned counsel for the appellant asserted that ouster clauses such as the one in s 59A are invalid because they are inconsistent with arts 4 and 121 of the FC which respectively provide for the supremacy of the Federal Constitution in the Federation and the judicial power of the Federation.

[23] For the respondents, learned SFC conceded that judicial review is itself a basic feature of the FC (see para 14(a) of the respondents' submission dated 27 July 2020 (encl 33) and para 2 of the additional speaking noted dated 2 August 2020 (encl 37)). The position taken by learned SFC is consistent with the acceptance by the Attorney General of the concept of 'judicial power' as espoused in *Semenyih Jaya, Indira Gandhi* and *Alma Nudo* (see *Dato' Sri Mohd Najib bin Hj Abdul Razak v Public Prosecutor* [2019] 5 MLJ 44 and *Public Prosecutor v Dato' Sri Mohd Najib bin Hj Abd Razak* [2019] 4 MLJ 421. See also *Saminathan a/l Ganesan v Public Prosecutor* [2020] 7 MLJ 681). For brevity, I do not propose to address the respondents' response in length save to state that learned SFC argued that:

(a) the drafting history of the FC suggest that ouster clauses per se may not be invalid. This is because it was intended that the remedies available to a litigant in judicial review shall be in the hands of Parliament; and

(b) in any event, the ouster clause in s 59A still permits challenge 'in regard to any question relating to the compliance with any procedural requirement of the Act' and accordingly, there is no need to determine, on the facts of this case, whether ouster clauses are constitutionally valid.

[24] Section 59A of Act 155 provides:

> 59A Exclusion of judicial review
>
> (1) There shall be no judicial review in any court of any act done or any decision made by the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, under this Act except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision.
>
> (2) In this section, 'judicial review' includes proceedings instituted by way of —
>
> (a) an application for any of the prerogative orders of *mandamus*, prohibition and *certiorari*;
>
> (b) an application for a declaration or an injunction;
>
> (c) any writ of *habeas corpus*; or
>
> (d) any other suit or action relating to or arising out of any act done or any decision made in pursuance of any power conferred upon the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, by any provisions of this Act.

[25] The provision unequivocally excludes not only judicial review in sub-s (1) but it also excludes any form of judicial review remedies in sub-s (2). It is in this context that its constitutional validity will be addressed. And since learned SFC has alluded to the legislative history of the FC, I think it would not be out of place for me to similarly undertake a historical analysis of the FC,

with reference to English, American and Indian jurisprudence.

Constitutional Supremacy — A historical analysis

[26] It is beyond dispute that ours is a nation that observes constitutional supremacy. In *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112, Suffian LP said at p 113:

> The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of state legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.

[27] The United Kingdom of Great Britain ('UK') on the other hand observes Parliamentary supremacy as it does not have a written constitution. It has instead an unwritten constitution which may be summarised in a single phrase, that is, 'Parliament is Supreme'. It is from this golden principle that all other UK constitutional conventions flow. The basic tenets of Parliamentary sovereignty can actually be hearkened to the celebrated judgment of Sir Edward Coke in *Dr Bonham's Case* (1610) 77 ER 646, or as it is more famously known, '*Bonham*'s case'. I find no necessity to set out the facts except to state that the learned Chief Justice suggested in rather clear terms that common law courts may strike down Acts of Parliament by the following observations in obiter which are now attributed to him as the basis for modern-day judicial review:

> And it appears in our books, that in many cases, the common law will ... controul Act of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void; and ... saith, some statutes are made against law and right, which those who made them perceiving, would not put them in execution ...

[28] Many years later, one commenter sought to rebuke and reject entirely the statement made by Sir Edward Coke. Sir William Blackstone posited that because Parliament is sovereign and supreme, its laws and dictates cannot be struck down. However, judges in their interpretive role may choose to ignore or read down certain provisions of the law in extreme cases of absurdity or when the words are impossible to reconcile with the language of the Act, its purpose or some other principle of law. Essentially, the laws passed by the English Parliament remain supreme and judges may give their best to interpret the laws as closely as possible to Parliament's intention and where absurdity arises, to apply them as coherently as possible. There is no question of striking them as being 'utterly void' (see William Blackstone, *Commentaries on the Law of England* (Oxford, Clarendon Press, 1765–1769) ('Blackstone') at p 91).

[29] To domesticate the UK's obligations under the European Convention of Human Rights ('European Convention'), the UK Human Rights Act 1998 was passed. Under s 4 of the UK Human Rights Act 1998, when the need arises, the courts have the obligation to declare any Act of Parliament incompatible with the European Convention. This can be regarded as the UK courts exercising an interpretive role and nothing more (see for example: *Regina (Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] 3 WLR 23, at para [20] (HL)). And this power of 'declaration of incompatibility' (and nothing more) is itself upon the blessings of Parliament. The power to strike down legislation is otherwise inconceivable in English law.

[30] Speaking more precisely in the context of ouster clauses, a recent UK Supreme Court judgment in *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22 ('Privacy International') illustrates how UK Courts hold steadfastly to the concept of Parliamentary supremacy. There, the ouster clause was assailed on two fronts, as follows:

(a) whether s 67(8) of the Regulation of Investigatory Powers Act 'ousts' the supervisory jurisdiction of the High Court to quash a judgment of the Investigatory Powers Tribunal ('IPT') for error of law? and

(b) whether, and if so, in accordance with what principles, Parliament might by statute 'oust' the supervisory jurisdiction of the High Court to quash the decision of an inferior court or statutory tribunal of limited jurisdiction?

[31] The majority of the UK Supreme Court (Lord Carnwath, Lady Hale and Lord Kerr), essentially decided the case as a matter of statutory construction. Lord Carnwath addressed the ouster clause as follows:

> [111] ... Judicial review can only be excluded by 'the most clear and explicit words' (*Cart*, para 31). If Parliament has failed to make its intention sufficiently clear, it is not for us to stretch the words used beyond their natural meaning. It may well be that the promoters of the 1985 Act thought that their formula would be enough to provide comprehensive protection from jurisdictional review of any kind.

[32] Having answered the first question in that way (that the ouster clause was not worded widely enough to exclude judicial review), the answer to the second question was essentially rendered moot. In any event, it is still worth quoting Lord Carnwath's observations, as follows:

> [144] In conclusion on the second issue, although it is not necessary to decide the point, I see a strong case for holding that, consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law. In all cases, regardless of

A the words used, it should remain ultimately a matter for the court to determine the extent to which such a clause should be upheld, having regard to its purpose and statutory context, and the nature and importance of the legal issue in question; and to determine the level of scrutiny required by the rule of law.

B **[33]** As formidable a passage it may be, it bore no practical application to the facts of the case because the Supreme Court essentially held that the ouster clause was not wide enough to exclude judicial review.

C **[34]** Be that as it may, the dissenting judgment of Lord Sumption, on the constitutional point aptly illustrates how English jurisprudence regards the constitutional validity of ouster clauses in light of the doctrine of Parliamentary supremacy:

D [209] The rule of law applies as much to the courts as it does to anyone else, and under our constitution, that requires that effect must be given to Parliamentary legislation. *In the absence of a written constitution capable of serving as a higher source of law, the status of Parliamentary legislation as the ultimate source of law is the foundation of democracy in the United Kingdom*. The alternative would be to treat the courts as being entitled on their own initiative to create a higher source of law than E statute, namely their own decisions. In *R (Miller) v Secretary of State for Exiting the European Union (Birnie intervening)* [2018] AC 61, at para 20, the Divisional Court accepted that:

> ... the most fundamental rule of UK constitutional law is that the Crown in Parliament is sovereign and that legislation enacted by the Crown with the F consent of both Houses of Parliament is supreme ... Parliament can, by enactment of primary legislation, change the law of the land in any way it chooses. There is no superior form of law than primary legislation, save only where Parliament has itself made provision to allow that to happen.

G In this court, sitting in banc for the first and only time, the proposition was common ground between the majority and the dissenting minority. The joint judgment of the eight judges of the majority recognised (para 43) that Parliamentary sovereignty was 'a fundamental principle of the UK constitution', and adopted the celebrated statement of AV Dicey (*Introduction to the Study of the Law of the Constitution*, 8th ed (1915), 38, that it comprised H

> the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

I Ms Rose would therefore have had a mountain to climb if she had based her alternative case on the more radical form of the argument. In fact, she was wise enough not to do this. Her case was firmly based on the conceptual inconsistency between an ouster clause and the existence of limits on the jurisdiction of the Investigatory Powers Tribunal. (Emphasis added.)

[35] Lord Sumption very clearly (and perhaps even the majority though less clearly) impliedly deferred to Parliamentary discretion in the absence of a written constitution as the 'higher source of law'. A

[36] It is perhaps timely to appreciate the biggest difference between the US and the UK as the former has a written constitution as the 'higher source of law'. Two prominent features of the US Constitution are relevant at this stage. B

[37] Firstly, the US Constitution does not have a supremacy clause like ours except for the one in Part VI. It will be referred to later. Second, the portion on the Judiciary in Part III is rather narrow. Relevant to this discussion is s 1 of Part III which provides as follows: C

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office. D

[38] Despite the absence of an absolute supremacy clause, it is well understood in American constitutional law that the US Constitution reigns supreme over all other laws. Corollary to this is the understanding that the courts are the only and final interpreters of the Constitution. They must, by virtue of their office be endowed with the powers to strike down legislation to uphold the supremacy of the Constitution. Their powers to do that are not indicative of judicial supremacy but merely an integral facet of constitutional supremacy (see the works of Alexander Hamilton, one of the drafters of the US Constitution, example the Federalist Paper: No 78 (The Judiciary Department) (25 May 1788) where he wrote under the pseudonym 'Publius'; Federalist Paper No 80 (The Judiciary Continued) (25 June 1788); Shlomo Slonim, *'Federalist No 78 and Brutus' Neglected Theses on Judicial Supremacy* [2006] 23(7) *Constitutional Commentary 7* at pp 8–10; and *Marbury v Madison* 1803 1 Cranch 137; 1803 5 US 137 ('Marbury')). E F G

[39] In addressing the importance of judicial review vis a vis legislative acts, suffice that I quote what the Supreme Court of US said, at p 178 of *Marbury*: H

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. I
>
> If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

> Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.
>
> This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare that, if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

[40] It was mentioned earlier that the US does not really have a supremacy clause in the likes of our FC. Article VI of the US Constitution provides, in part, as follows:

> ... This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding ...

[41] One would observe that there is no inconsistency clause in the US Constitution positively allowing judges to strike down unconstitutional laws. Next, it does not grant supremacy to the Constitution alone but to all other Congress-made laws as well. Despite the context, the Supreme Court in *Marbury* nonetheless understood the historical context of the US Constitution and how the American State was not to be like UK where Parliament is supreme. Thus, all laws cannot be more supreme than the Constitution. Where the law is consistent with it, the courts must apply them; where there is repugnancy, ordinary laws must yield to the Constitution.

[42] Having said that, it would be instructive to briefly discuss the Constitution of India, in particular the extent of judicial power envisioned by the drafters of the Indian Constitution. To begin, it should be noted that the Indian Constitution does not at all have a supremacy clause. Instead, the powers of the Supreme Court are enshrined in art 32 which constitutionally guarantees remedies for breaches of fundamental liberties as an integral enforcement feature of Part III of the Indian Constitution which houses the fundamental rights of all persons in India. A like provision in respect of the High Courts in India is contained in art 226. Apart from art 32, the only other feature of the Indian Constitution is art 13 which allows the courts to strike down laws which are inconsistent with Part III (fundamental liberties).

[43] Despite the absence of an omnibus supremacy clause, the Indian Courts have no less held that the Indian Judiciary is the 'guardian' of the Indian Constitution. A strong and independent Judiciary is not therefore the antithesis but a feature and result of constitutional supremacy. In turn, the key defining feature of the Judiciary upon which the provisions of the constitution may be protected is the mechanism of judicial review (see the judgments of the Indian Supreme Court in *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461; (1973) 4 SCC 225 and the *The State of Bihar & Ors v Subhash Singh* (1997) 4 SCC 430 ('Subhash'); MP Jain, *Indian Constitutional Law* (6th Ed, LexisNexis Butterrworths Wadhwa Nagpur, 2010 ('MP Jain')).

[44] Indeed, in defining the role of the Indian Judiciary against the constitutional backdrop, MP Jain observed as follows at pp 21–22:

> The Constitution of India being written constitutes the fundamental law of the land. This has several significant implications. It is under this fundamental law that all laws are made and executed, all governmental authorities act and the validity of their functioning adjudged. No legislature can make a law, and no governmental agency can act, contrary to the Constitution. No act, executive, legislative, judicial or quasi-judicial, of any administrative agency can stand if contrary to the Constitution. The Constitution thus conditions the whole governmental process in the country. The Judiciary is obligated to see that the provisions of the Constitution are not violated by any governmental organ. This function of the Judiciary entitles it to be called as the 'guardian' of the Constitution and it can declare an Act of a legislature or an administrative action contrary to the Constitution as invalid.

[45] Integral to any written constitution, which proclaims itself to be supreme either expressly or by design, there must exist an instrument by which its provisions may be protected and enforced. That instrument is the judicial branch of Government.

[46] In light of the above discussion, it is now pertinent to examine the Malaysian FC.

Article 4 of the FC

[47] Article 4 of the FC in its present form is the product of disagreement between the drafters of the Federal Constitution. In the final draft that was submitted, art 4 existed as draft arts 3 and 4 (see Khoo Boo Teong, *Rule of Law in the Merdeka Constitution* [2000] JMCL 59; and *KC Vohrah, Philip Koh and Peter Ling, Sheridan & Groves — The Constitution of Malaysia* (5th Ed, Malayan Law Journal Sdn Bhd, 2004), at pp 39–40).

[48] Draft art 3 provided as follows:

> 3 *The Rule of Law*

A (1) This Constitution shall be the supreme law of the Federation, and any provision of the Constitution of any State or of any law which is repugnant to any provision of this Constitution shall, to the extent of the repugnancy, be void.

(2) Where any public authority within the Federation or within any State performs any executive act which is inconsistent with any provision of this Constitution or of any law, such act shall be void.

[49] Draft art 4 provided as follows:

4 *Enforcement of the Rule of Law*

(1) Without prejudice to any other remedy provided by law —

(a) Where any person alleges that any provision of any written law is void, he may apply to the Supreme Court for an order so declaring and, if the Supreme Court is satisfied that the provision is void, the Supreme Court may issue an order so declaring and, in the case of a provision of a written law which is not severable from other provisions of such written law, issue an order declaring that such other provisions are void.

(b) Where any person affected by any act or decision of a public authority alleges that it is void because —

(i) the provision of the law under which the public authority acted or purported to act was void, or

(ii) the act or decision itself was void, or

(iii) where the public authority was exercising a judicial or quasi-judicial function that the public authority was acting without jurisdiction or in excess thereof or that the procedure by which the act or decision was done or taken was contrary to the principles of natural justice,

he may apply to the Supreme Court and, if the Court is satisfied that the allegation is correct, the Court may issue such order as it may consider appropriate in the circumstances of the case;

[50] Draft art 4 was rejected and remains absent in our FC. Draft art 3 was redrafted and currently exists in art 4 in its present form. The reason for this change is explained in the Government White Paper:

53. It has been agreed that the Federal Constitution should define and guarantee certain fundamental rights, and it is proposed to accept the principles recommended by the Commission for inclusion in Part II of the Federal Constitution although there have been some changes in drafting. The Article proposed by the Commission on the subject of enforcement of the rule of law was, however, found unsatisfactory and has been omitted on the ground that it is impracticable to provide within the limits of the Constitution for all possible contingencies. It is considered that sufficient remedies can best be provided by the ordinary law.

[51] With respect to learned SFC, it is thus difficult to fathom how the Government White Paper in any way suggests that the idea behind the amendments leading up to the present art 4 were predicated upon leaving the extent of judicial review and remedies inherent to its fulfilment to the absolute control of Parliament. On the contrary, the redrafting of art 4 was meant to enlarge the scope of its application as widely as possible rather than to limit it.

[52] Learned SFC referred us to the earlier drafts of draft arts 3 and 4 where they appeared as draft arts 1 and 2.

[53] Draft art 1 provided as follows:

> 1 *The Rule of Law*
>
> (1) This Constitution shall be the supreme law of the Federation, and any provision of the Constitution of any State or of any written law, and any custom or usage having the force of law, shall, in so far as it is repugnant to any provision of this Constitution, be void.
>
> (2) Where any public authority within the Federation or within any State performs any executive act which is inconsistent with any provision of this Constitution or with any written law made thereunder, such act shall, to the extent of the inconsistency, be void.
>
> (3) Where any public authority within a State performs any executive act which is inconsistent with any provision of the Constitution of that State or to any written law made thereunder, such act shall, to the extent of the inconsistency, be void.

[54] Draft art 2, titled 'Enforcement of the Rule of Law' in turn provided for certain mechanisms to challenge legislative or executive actions. Appended to the draft Constitution was 'Comments on the Draft'. The Comment on Draft art 1, by Sir Ivor Jennings reads:

> This Article is included because (1) the laws of the Malay States have developed out of pure autocracy and relics of that autocracy remain; (2) it is necessary to assert the supremacy of the Federal Constitution over the State Constitutions.
>
> Executive as well as legislative acts have been dealt with, with particular reference to provisions against discrimination. It is hoped that references in clauses (2) and (3) to 'written law' do not imply that acts contrary to unwritten law are valid.

[55] More importantly, the comment to draft art 2, reads:

> Burma 25, India 32 and Pakistan 22 — in spite of my objections in the last case — apply the prerogative writs to the enforcement of Fundamental Rights. There is, in fact, no need whatever to apply the details of English law, which are curiosities of history inapplicable to Asian conditions; the use of the names is confusing; and the Indian Courts have departed a long way from English law. For the confusion which

A results, see judgment of the Sind Chief Court in Tamizuddin Khan's case. It has been thought enough to have simple orders in the nature of certiorari and mandamus — habeas corpus appears in draft Article 3 but without technical details.

Further, the provisions for enforcement have been extended to the whole Constitution and not merely to the Chapter on Fundamental Liberties.

B

[56] The crucial portion of Jennings's comment on Draft art 1 of the original draft, is where he said that 'There is, in fact, no need whatever to apply the details of English law, which are curiosities of history inapplicable to Asian conditions; the use of the names is confusing; and the Indian Courts have departed a long way from English law'. He then posited that reliance on simple orders such as certiorari and mandamus are sufficient.

C

[57] Again, it must be borne in mind that in *Marbury* the US Supreme Court had to declare for itself as having the powers to review legislation and to strike them down where they are repugnant to the constitution. In India, there is no supremacy clause per se and the importance of the judicial function is paramount in arts 32 and 226 of the Indian Constitution in constitutionally guaranteeing the remedies inherent in judicial review. As indicated in *Subhash*, it is these powers and the general construct of the Judiciary which suggest that the courts in India are tasked to uphold the supremacy of the Indian Constitution. The drafters of our FC were aware of this and it is precisely how they envisioned the Malaysian Judiciary to operate as apparent from the following observations in the Reid Commission Report 1957:

D

E

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> 123 ... First, we consider that the function of interpreting the Constitution should be vested not in an ad hoc Interpretation Tribunal, as provided by the Federation Agreement, but (as in other federations) in the ordinary courts in general and the Supreme Court in particular. The States cannot maintain their measure of autonomy unless they are enabled to challenge in the Courts as ultra vires both Federal legislation and Federal executive acts. Secondly, the insertion of Fundamental liberties in the draft Constitution requires the establishment of a legal procedure by which breaches of those Fundamental Liberties can be challenged.

G

[58] This leads us to our art 4 as it is presently worded. The first thing to note about it is that it has no equivalent in its American and Indian counterparts. The framers of our FC surely knew this because as can be seen in the Comments to the Draft Constitution, they made significant reference to them and other foreign constitutions. The fact that they intended to include a supremacy clause in the likes of art 4 clearly suggests that our version of supremacy clause was intended to be better and stronger, at the least in terms of phraseology, than the jurisdictions referred to.

H

I

[59] In the case of the United States, the *Marbury* decision has long been followed by a slew of subsequent US Supreme Court decisions. In the case of

India, our drafters had guidance from Indian decisions (and indeed one is quoted in the Comment to Draft art 2) in addition to the actual provisions of the Indian Constitution (especially Part III — fundamental liberties), art 32 and art 226. I cannot therefore imagine how, after having adopted that course, that our drafters could have envisioned shackling or limiting judicial review in the way the respondents now suggest.

[60] Further, we must also have due regard to the way art 4, as a whole, eventually came to be worded. Articles 4(3) and 4(4) relate to the procedure in a specific category of suits. Article 128(1) empowers a person or a party to initiate suit in the exclusive original jurisdiction of the Federal Court if specific circumstances are met. The first relates to a situation where a State sues the Federation or vice versa, or where a State sues another State. No leave is required for the first category. In the second category of cases, where the validity of any law is questioned on the grounds that the relevant legislature (Federal or State) has no power to make the law, it shall be brought in the original jurisdiction of the Federal Court subject to art 4(4) — with leave of a single judge of the Federal Court.

[61] The words employed in art 4(3) are 'The validity of any law made by Parliament or the Legislature of any State shall not be questioned ...' followed by conditions for challenge. This is only in respect of the original jurisdiction of the Federal Court and even then the language is not prohibitive but regulatory.

[62] The other provision is art 4(2). It provides:

> (2) The validity of any law shall not be questioned on the ground that —
>
> (a) it imposes restrictions on the right mentioned in Clause (2) of Article 9 but does not relate to the matters mentioned therein; or
>
> (b) it imposes such restrictions as are mentioned in Clause (2) of Article 10 but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.

[63] Again, art 4(2) is regulatory in the sense that it allows challenges on validity but subject to conditions. Apart from the restrictions contained in cll (2), (3) and (4) of the FC, art 4(1) very liberally declares that:

> This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

[64] Reading the provisions of art 4 as a whole and in light of its forms in draft, it is quite clear that the framers of the FC intended that art 4 be worded

and construed liberally and prescriptively. Leaving aside some restrictions, the entire spirit of art 4 is that any law passed by the Legislature (Federal or State), for example, is liable to be struck down if it is inconsistent with the Constitution.

[65] From the analysis of the structure of art 4 and the Comment of the drafters of the Federal Constitution, it is apparent that the intention was to maintain the Rule of Law. The reason for removing remedies from the Constitution and not having a clause akin to arts 32 or 226 of the Indian Constitution and instead, having a general and supremacy clause in art 4 was to set out a general rule of inconsistency rather than creating a set category of reliefs that may be made available in the FC itself as that approach would be too restrictive.

[66] The natural conclusion leads us to art 121 of the FC. It clearly stipulates that judicial power shall be vested in the two High Courts (or in the Supreme Court as it originally was). The idea, applying the Indian and American approaches, was that where there is repugnancy in the law or inconsistency in the conduct of the Executive vis a vis the law, it would be the sole and solemn duty of the Judiciary to say emphatically what the law is (to paraphrase Marshall CJ in *Marbury*, p 177). The Judiciary cannot perform this constitutional role if it is dissociated from all and any remedy it can afford. In this sense, the argument by the respondents that Parliament can by law provide for the remedy — to the extent that there may be no remedy — cannot but be rejected.

[67] True to the concept of check and balance, Parliament can define the method of remedies but it cannot strip them away as they are vested in the courts. At this juncture, it would be pertinent to explain the concept of judicial review.

Judicial review

[68] The term 'judicial review', in a wider and more holistic sense, is used to describe the exercise of judicial power of review by the courts over the conduct of either the Legislative or Executive branches of government. It involves the application of the judicial mind to the assessment of the legality of their conduct. It is not an ancillary but integral and corollary feature to the Rule of Law and democracy as all civilised systems understand it. The narrower definition of 'judicial review' is in its more technical use as a method of suit prescribed by O 53 of the ROC 2012 — a specific mode of application made for the purpose of seeking specific reliefs under para 1 of the Schedule to the CJA 1964.

[69] Griffith CJ's attempt to define judicial power in *Huddart Parker & Co Pty Ltd & Appleton v Moorehead* (1909) 8 CLR 330 in an adversarial system, is instructive and has withstood the test of time. At p 357, the learned Chief Justice of Australia said:

> ... 'judicial power' as used in sec 71 of the Constitution mean[s] the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

[70] Coming back to the FC, any law passed inconsistent with the provisions of the FC are void. But, it is obvious that the FC is not self-executing. It cannot therefore proactively protect itself from breach. The organ of government tasked with this onerous obligation is the Judiciary. The power to do it is loosely described as judicial power and the mechanism by which it is done is called judicial review.

[71] The above view is reaffirmed in the judgment of Abdoolcader SCJ in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 ('Yap Peng') at p 317, where His Lordship held:

> Judicial power may be broadly defined as the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to rights and liabilities of one or more parties. It is virtually impossible to formulate a wholly exhaustive conceptual definition of that term, whether exclusive or inclusive ...

[72] As stated earlier, the respondents have no quarrel with the argument that *Semenyih Jaya* and *Indira Gandhi* correctly held that judicial power is a basic structure of the FC and that it is reposed singularly in the Superior Courts. What they submit is that the historical documents behind the formulation of the Constitution of Malaya (later Malaysia) were not available to counsel and judges in those cases. They submit that a perusal of these historical records will indicate that Parliament may make law to circumscribe the jurisdiction of the courts including any relief that may be made available in judicial review. In the words of learned SFC, 'federal law may prescribe what the legislature considers as 'sufficient remedy' to meet the demand of the circumstances. The very act of prescribing a remedy by federal law, without more, does not amount to an act calculated to jeopardise the due exercise of judicial power'.

[73] Briefly, *Semenyih Jaya* concerned in part the issue of a section in the Land Acquisition Act 1960 binding judges of the High Court to the opinion of lay assessors in the determination of quantum of compensation in land

acquisition cases. It was argued that the amended art 121(1) (as it presently stands) limits the jurisdiction of the courts to the laws that Parliament may enact. This court, in departing from its formerly held view in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1 ('Kok Wah Kuan'), held quite unequivocally that separation of powers and its corollary of judicial power is an inherent feature of the Federal Constitution. This was rather assertively restated in *Indira Gandhi*.

[74] The two judgments in *Semenyih Jaya* and *Indira Gandhi* have effectively held that the amendment to art 121(1) did not in any way hinder judicial power and that it has always remained vested in the Superior Courts since Merdeka Day in spite of the 1988 amendment to art 121. *Semenyih Jaya* was essentially criticised for falling short of striking down the 1988 amendment as being unconstitutional (see Wilson Tze Vern Tay, *Basic Structure Revisited: The Case of Semenyih Jaya and the Defence of Fundamental Constitutional Principles in Malaysia* Asia Journal of Comparative Law 1, at p 23). It will be noted that the amendment to art 121(1) was also not struck down in *Indira Gandhi*.

[75] The answer to the criticism may be provided thus: this court in both *Semenyih Jaya* and *Indira Gandhi* appeared to have taken the approach of *reading down* the 1988 amendment to art 121(1). Having taken that approach, there was thus no real need to expressly strike down the amendment to art 121(1). Similar effect had been achieved by reading down the amendment.

[76] The principles set out in *Semenyih Jaya* and *Indira Gandhi* are irrefutably clear. Without having to say that the 1988 amendment to art 121(1) is unconstitutional and given this court's final say on the effect (or non-effect) of the amendment to judicial power in light of the basic structure doctrine, it should be clear to all that judicial power is not derived from the black letter of art 121(1) but from the spirit of it that was enacted on Merdeka Day. Just to restate the principle in those cases, no matter how art 121(1) was or may be amended, it being a basic feature of the FC, remains to be read as it was prior to the 1988 amendment. I say this with extreme caution and only to clear up the confusion that still looms over some quarters who cannot seem to reconcile *Semenyih Jaya* and *Indira Gandhi* with the post-amendment art 121(1).

[77] Accordingly, art 121(1) should be read in the sense that the words 'the judicial power of the Federation shall be vested in the two High Courts of co-ordinate jurisdiction and status' still exist despite their deletion and in the same vein, the words inserted by the 1988 amendment to the extent that 'the High Courts ... shall have such jurisdiction and powers as may be conferred by or under federal law' as having no effect whatsoever of diminishing or subordinating judicial power to Parliament or declaring Parliament supreme in any way.

[78] Thus, in *Semenyih Jaya*, the Land Acquisition Act 1960, being an Act of Parliament, did not have the effect of Parliament subordinating the Judiciary to the opinion of lay assessors as that would be violative of judicial power in art 121(1) and could therefore be struck down as being unconstitutional under art 4(1).

[79] More on point is the ratio decidendi of this court in *Indira Gandhi* where it was held that the decision of the Registrar of Muallafs in Perak to convert minor children to Islam without the consent of the other parent is justiciable and amenable to judicial review.

[80] The two judgments aforementioned have held that judicial review cannot be excluded by any Act of Parliament and these two judgments have been approved and followed by a nine-member Bench in *Alma Nudo*. The principles pertaining to judicial power propounded in *Semenyih Jaya* and *Indira Gandhi* have also been applied in *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443. In *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561, the majority emphasised that it had 'no reservations in accepting the proposition of law expounded in the *Semenyih Jaya* case'.

[81] Going by the principles that have been elucidated up to this point, it is clear that the supremacy of the FC in art 4(1) and its corollary device of judicial power are basic features of the FC. Accordingly, the power of the court to scrutinise state action whether Legislative, Executive or otherwise, cannot be excluded. This in itself should be a good enough answer to the respondents' second argument that s 59A can be justified without a definitive ruling on the validity of ouster clauses because it allows for challenges 'in regard to any question relating to the compliance with any procedural requirement of the Act'.

[82] To accede to the submission of learned SFC would mean that courts can only scrutinise what Parliament allows to be scrutinised. There is no alternative but to reject the submission because it is reminiscent of Parliamentary supremacy. Under art 4(1), all laws are subject to the FC. And, as garnered from the FC's legislative history, the intendment of art 4(1) was to cover all acts whether legislative, executive, quasi-legislative, quasi-judicial, etc. We cannot therefore, in the presence of a written constitution declaring itself to be the highest source of law, adopt the English method of resolving the legality of ouster clauses simply on the basis of statutory construction much in the way the respondents suggest.

[83] Accordingly, s 59A of Act 155 must be assessed from the larger angle on whether ouster clauses are, as a whole, constitutionally valid in light of art 4(1). This is especially so in the context of the respondents' argument that remedies can be restricted at the discretion of Parliament. The argument will naturally fail if it is found that remedies are an integral aspect of judicial review against which there can be no ouster — whether constitutionally or statutorily evoked.

The constitutional validity of ouster clauses

[84] An ouster or privative clause is essentially any provision of law which seeks to exclude judicial review or scrutiny. In England, such clauses were read down primarily upon the decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission and another* [1969] 2 AC 147. Complicated administrative law principles were established to distinguish between errors of law within and outside of jurisdiction.

[85] The said administrative law principles eventually found their way into Malaysia most prominently in the judgment of the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317. But even prior to that judgment, our courts have opted to ignore ouster clauses. For example, in *Sungai Wangi Estate v UNI* [1975] 1 MLJ 136, Eusoffe Abdoolcader J ignored an ouster clause in s 29(3)(a) of the Industrial Relations Act 1967. The learned judge held at p 140, as follows:

> The finality clause enacted in section 29(3)(a) of the Industrial Relations Act to the effect that an award of the Industrial Court shall be final and conclusive and no award shall be challenged, appealed against, reviewed, quashed or called in question in any court of law has already been breached by the doctrine of judicial review and accordingly decisions of the Industrial Court are in fact open to review when so warranted.

[86] Perhaps the closest case where the validity of ouster clauses was first considered but not necessarily adjudged under a constitutional lens is the judgment of the Court of Appeal in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289 ('*Sugumar* (CA)'). There, at pp 307–309, the Court of Appeal observed that the 1988 amendment to art 121(1) of the FC had no effect of removing judicial power from the courts. Thus, Parliament's attempt to immunise itself from judicial review was an incursion into judicial power which simply cannot be done and hence was an exercise in futility.

[87] The Court of Appeal was reversed on appeal to this court in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72 ('*Sugumar* (FC)'). This court held, in essence, that Parliament having declared that there

should be no judicial review save on any procedural non-compliance with the Act, means exactly what it says.

[88] Learned counsel for the appellant argued that there have been numerous subsequent pronouncements by this court in various cases which have either watered down or departed entirely from the ratio in *Sugumar* (FC). With respect, and for convenience, some of the cases cited by learned counsel, did so in obiter. It is sufficient to say that upon the pronouncements of this court in *Semenyih Jaya* and *Indira Gandhi*, the decision in *Sugumar* (FC) is no longer authority for the proposition it seems to make.

[89] As has been explained earlier in this judgment, no act of any public body is immune from the scrutiny of art 4(1). The Judiciary is the organ which is tasked to interpret the law under art 121(1) and is thus the medium through which art 4(1) operates. These provisions form part of the basic structure of the FC. Reading the two provisions together, it is quite clear that ouster clauses can never oust, diminish or exclude the judicial power of the courts and its vehicle: judicial review — no matter how cleverly and widely crafted. Section 59A of Act 155 to the extent that it seeks to do that is therefore invalid and unconstitutional.

[90] The next and final argument is the remedies point. As stated earlier, remedies were excluded from the FC not because it was intended that Parliament would have the unbridled power to control them as they wished but because enacting them into the FC might have been viewed as constitutionally limiting them to any degree. In this vein, a discussion on arts 5(1) and 8(1) is attracted and they provide as follows:

> Article 5
>
> (1) No person shall be deprived of his life or personal liberty save in accordance with law.
>
> Article 8
>
> (1) All persons are equal before the law and are entitled to the equal protection of the law.

[91] At this juncture, the third case in the trilogy, *Alma Nudo* is relevant where Richard Malanjum CJ said:

> [104] 'Law' must therefore satisfy certain basic requirements, namely:
>
> (a) it should be clear;
>
> (b) sufficiently stable;
>
> (c) generally prospective;

A (d) of general application;

(e) administered by an independent judiciary; and

(f) the principles of natural justice and the right to a fair trial are observed.

B **[92]** Thus, a 'law' is not law simply because it was passed by Parliament upon ticking all the constitutional procedural tick boxes to make it law. It must, as art 4(1) suggests, be passed in accordance with the FC which necessarily requires compliance with Part II thereof.

C **[93]** In art 5(1), 'life' is not confined to mere animal existence. It encompasses an entire spectrum of rights integral to meaningful human existence. A law necessarily impacts the life of any person and where he is affected by it and seeks to challenge it, he — no matter whether he be a pauper or an aristocrat — has the same right as anyone else to approach the courts for a remedy. It is here that we see art 8(1) falling into place. Collectively when strung together, the two provisions formulate a principle which we now know to be 'access to justice'.

E **[94]** This court has held in at least one case that the right of access to justice is a fundamental right guaranteed under art 5(1) (see *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12). However, what is the point of providing access to the courts if the courts are unable to grant any remedy? That is where art 8(1) is attracted. While all are entitled to approach the courts to seek a definitive court ruling on their rights and liabilities, the remedy is equally important as that is how one ensures 'equal protection of the law'. Putting it in rather emphatic terms, the right of access to justice includes the right to an effective remedy.

G **[95]** I fully endorse the views of two learned authors, Bryan Garth and Mauro Cappelletti who wrote in *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective* [1978] 27 Buffalo Law Review 181, at pp 184–185, as follows:

H > Indeed, the right of effective access is increasingly recognized as being of paramount importance among the new individual and social rights, since the possession of rights is meaningless without mechanisms for their effective vindication. Effective access to justice can thus be seen as the most basic requirement — the most basic 'human right' — of a modern, egalitarian legal system which purports to guarantee, and not merely proclaim, the legal rights of all.

I **[96]** In other words, the Rule of Law stands as only a whimsical notion to decorate textbooks if there is no appropriate and effective means of enforcing it. Again, India does not have a supremacy clause but that does not detract from

the supremacy of their Constitution because an enforcement mechanism is provided for in arts 13, 32 and 226. Here, we do not need such constitutional provisions because art 4(1) is pervasive enough to encompass the enforcement mechanism for Part II. Article 4(1) would be rendered otiose and nugatory if the courts can strike down legislation or executive action but at the same time, remain powerless to enforce any breach of fundamental rights that arise from such invalid 'laws'.

[97] In fact, it should be understood that para 1 of the Schedule to the CJA 1964 is merely declaratory of the court's inherent power. That this is the case was suggested by Edgar Joseph Jr FCJ in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 ('Rama Chandran'), at pp 195–196:

> To recapitulate, I had at the outset observed that supervisory review jurisdiction is a creature of the common law and is available in the exercise of the courts' inherent power but its extent may be determined not merely by judicial development *but also by legislative intervention*.
>
> In this context, it is pertinent to note that the jurisdiction of the courts in Malaysia to issue prerogative orders is derived from the prerogative jurisdiction inherited from English decisions as well as from statute. The Courts of Judicature Act 1964, by s 25 read with para 1 of the Schedule thereto provides
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> ...
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> The Schedule is entitled 'Additional Powers' and this suggests powers over and above those already enjoyed by the High Court.

[98] 'Judicial review' within the context of judicial power in art 121(1) includes not just the adjudication of rights and liabilities in respect of any issue of law but, also an effective and meaningful form of redress. And, having been presented with the draft provisions of the FC and considering that the facts of the present appeal call upon us to decide the point, the principles of *Semenyih Jaya* and *Indira Gandhi* insofar as they declare judicial review to be an intrinsic feature of the FC necessarily extend to the remedies. Therefore, extrapolating what was said earlier about ouster clauses, no matter how they are worded and whether they purport to exclude judicial review entirely or just the portion on remedies, they remain unconstitutional. No one disagrees that s 59A of Act 155 is an ouster clause restricting not just the scope of judicial review but the remedies which may be afforded therefrom.

[99] It follows that the appellant has crossed the threshold set by the presumption of constitutionality in proving that s 59A is unconstitutional and it is hereby struck down under art 4(1) of the FC.

[100] In the premises, question 3 is answered in the negative.

[101] Nonetheless, before proceeding to address the other questions, the effect of this judgment needs to be clarified insofar as it declares that ouster clauses are invalid and how this affects the doctrine of separation of powers, particularly between the Legislature and the Judiciary.

Article 4(1) and separation of powers

[102] The above answer to question 3 begs the following sub-questions: does the effect of the present ruling give rise to judicial supremacy? More specifically, if ouster clauses are invalid, are courts at liberty to examine all sorts of questions without regard to their lack of expertise in certain matters? And does this ruling suggest that Parliament has no role of legislation insofar as judicial review and access to justice are concerned?

Judicial controls

[103] The holding that ouster clauses are invalid does not in any way suggest that the courts are now supreme. As the guardian of the FC, the Judiciary must forever remain mindful that there are certain matters in which it cannot trespass. The larger point to be made is that the Judiciary too must observe the doctrine of separation of powers. In fact, this very point was emphasised by Marshall CJ in *Marbury*, at p 170:

> The province of the court is solely to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

[104] His Honour then went on to state that where the question concerns fundamental liberties and the compliance of any body — whether legislative or executive — the courts must have the jurisdiction to hear and determine it. It can be postulated that His Honour was referring to the judicially invented doctrine of non-justiciability.

[105] Non-justiciability refers to matters over which courts retain the jurisdiction to review but because of the nature of the subject-matter, refrain from deciding it. One reason may be because the power under review in the case may be a prerogative one and hence one over which there can be no question. A suitable example of this is where the sole prerogative of the Yang Di-Pertuan Agong to pardon convicts is questioned (see *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385 at p 387).

[106] Another example is matters where the question or questions posed are abstract, academic or hypothetical (see *Bar Council*).

[107] Another important area which remains non-justiciable is matters which are derived from national security issues involving a high degree of secrecy. A strong authority for this is the decision of the House of Lords in the renowned case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 ('CCSU'). The brief facts, as garnered from the head notes, are these.

[108] The UK Government had set up the Government Communications Headquarters ('GCHQ') to ensure the security of military and official communications and to provide the government with intelligence which also involved the handling of secret information vital to national security. The staff of GCHQ had long been allowed to belong to national trade unions. On 22 December 1983, the Minister of Civil Service, the respondent, in effect varied the terms of service of the appellants, employees of GCHQ, from belonging to national trade unions. The respondent did this without prior consultation with the appellants. Aggrieved, the appellants sought judicial review against the respondent on the ground that she had acted unfairly by not consulting them prior.

[109] In defending the respondent's action, the Secretary to the Cabinet effectively deposed an affidavit stating to the effect that prior consultation was not accorded for what had taken place at GCHQ because the national unions were engaged in national campaigns designed to damage government agencies. Had the appellants been consulted prior, the respondent and the government would have run the risk of exposing themselves to further disruption and more harm to GCHQ's operations (especially considering the secret nature of GCHQ's work).

[110] At first instance, Glidewell J granted the appellants the remedy of declaration, to wit, that the respondent's instruction as regards their terms of service was invalid and of no effect. The Court of Appeal reversed on the grounds that the matter was essentially non-justiciable. The matter was brought for consideration before the House of Lords which unanimously upheld the decision of the Court of Appeal.

[111] Lord Diplock's speech in *CCSU* is heralded as the leading speech in the case. His Lordship held that the respondent/Minister's decision was questionable on the usual grounds of judicial review being 'illegality', irrationality', and 'procedural impropriety' while at the same time expressing the view, quite liberally, that judicial review is also expanding to include the ground of proportionality. This it inevitably has (see *Rama Chandran*).

[112] Central to the case however was the ground of 'procedural impropriety' that the appellants had a legitimate expectation that they would be consulted before their right to associate themselves with unions could be stripped away.

A However, Lord Diplock held that on the facts of the case, there had to be a balance between the procedural right to be consulted, on the one side, and the government's national security interest, on the other. On the facts, the national security interest prevailed and the courts accordingly decided that it would be inappropriate to interfere. In the words of Lord Diplock, at pp 412–413:

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> The reason why the Minister for the Civil Service decided on 22 December 1983 to withdraw this benefit was in the interests of national security. National security is the responsibility of the executive government; what action is needed to protect its interests is, as the cases cited by my learned friend, Lord Roskill, establish and common sense itself dictates, a matter upon which those upon whom the
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> C responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves ...
>
> There was ample evidence to which reference is made by others of your Lordships
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> D that this was indeed a real risk; so the crucial point of law in this case is whether procedural propriety must give way to national security when there is conflict between (1) on the one hand, the prima facie rule of 'procedural propriety' in public law, applicable to a case of legitimate expectations that a benefit ought not to be withdrawn until the reason for its proposed withdrawal has been communicated to the person who has theretofore enjoyed that benefit and that person has been given
>
> E an opportunity to comment on the reason, and (2) on the other hand, action that is needed to be taken in the interests of national security, for which the executive government bears the responsibility and alone has access to sources of information that qualify it to judge what the necessary action is. To that there can, in my opinion, be only one sensible answer. That answer is 'Yes'.

F

[113] Without expressly endorsing and adopting them wholesale, Lord Roskill also explained certain matters which by the very nature of their subject matter, cannot be amenable to judicial review, at p 418:

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> It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not,
>
> H I think susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.

I

[114] The ratio decidendi extracted from *CCSU* is that on the facts of certain cases, the Judiciary cannot tread into certain matters as they may fall within the prerogative of the executive. In the larger context, the reason for this self-imposed judicial exclusion is that the Judiciary is simply not armed with

the expertise or the information to deal with those matters such as national security. For example, judges are not privy to intelligence reports and secret police investigations. Lest I am misunderstood, the concept of non-justiciability does not mean that the Judiciary shirks its constitutional obligation to decide the legality of Government action or abstention. It also does not mean that the Judiciary can or does take instructions from the Legislature or the Executive as to what it can or cannot adjudicate. Although ouster clauses were not in issue before Their Lordships in *CCSU*, the lesson learned from that case is that the Judiciary has an inherent obligation to understand what it can and cannot adjudicate upon, given the inherent constitutional limits of the institution.

[115] Accordingly, given that the FC is supreme and how this is translated through judicial power, and in light of the right of access to justice, the rule can be summarised thus. All persons are equally entitled to approach the courts for a ruling as to their rights and liabilities. The courts are in turn constitutionally required to examine the claim on face value as they did in *CCSU*. However, whether the litigant is definitively entitled to the remedy sought is another matter entirely and it remains for the courts to decide on the facts and circumstances of each case whether the subject matter is justiciable. By way of example, it is insufficient for the government to rely on an ouster clause as a convenient means to tell the courts what they can and cannot look at. Whatever concern they have may perhaps be more properly ventilated, in such cases, by way of an affidavit deposing why the matter is non-justiciable stating clearly the reason for the view eg national security.

[116] Apart from the doctrine of non-justiciability, the courts have throughout the centuries developed other appropriate judicial mechanisms to check their own powers so as not to cross the borders of separation of powers. One of the most powerful inventions is the doctrine of presumption of constitutionality. I can do no better than to quote a passage from the judgment of Abdoolcader J (as he then was) in *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116 ('Harun Idris') at p 117, to describe the doctrine as follows:

> In considering the matter in issue the principles to be borne in mind are threefold:
>
> Firstly, there is a presumption — perhaps even a strong presumption — of the constitutional validity of the impugned section with the burden of proof on whoever alleges otherwise.
>
> Secondly, the presumption is not however to be carried to the extent or stretched to for the purpose of validating an otherwise invalid law, and if the force of Article 8(1) bears sufficiently strongly upon and against that presumption, it must then necessarily bend, break and give way under that force.

A And thirdly, for this purpose a statute or statutory provision must be examined on its own merits and not by comparison with other similar provisions ...

B **[117]** The doctrine exists for two reasons. Firstly, it seeks to appreciate the importance of the role of the Legislature as the democratically elected body representing the will of the People and upon whose mandate it is formed to pass laws. As stated by Lord Sumption in his dissent in *Privacy International*, 'Parliament is presumed not to legislate contrary to the rule of law'. And though the English have an unwritten constitution, as Abdoolcader's judgment in *Harun Idris* suggests, the doctrine is also equally applicable to systems with written constitutions (see also *Shri Ram Krishna Dalmia & Ors v Shri Justice SR Tendolkar & Ors* 1958 SC AIR 538 cited with approval in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257). That said, in cases where the presumption is rebutted, the courts are required to step in.

D

E **[118]** Secondly, and perhaps a rephrase of the first point is that where the constitutionality of a provision is impugned, the doctrine casts a veil of immunity on all other provisions similarly worded or of like purport from any declaration of invalidity. This speaks to the third point highlighted by Abdoolcader J in *Harun Idris*, namely that a statutory provision must be examined on its own merits. Thus, while this judgment opines that ouster clauses as a whole are invalid as being inconsistent with art 4(1), the declaration of invalidity applies only in respect of s 59A of Act 155. The practical effect of the doctrine judicially invented is that it prevents courts from unravelling an entire regime of laws that Parliament may have enacted by limiting the effect of the judgment to the *lis* and nothing more.

F

G **[119]** Hence, the sub-question whether the Judiciary's role in light of arts 4(1) and 8(1) creates judicial supremacy simply does not arise because, as the development of our Malaysian common law suggests, the courts have constantly kept themselves in check by judicially invented mechanisms so as to not traverse into matters over which they ought not to decide.

H **[120]** This brings me to the second sub-question, ie to what extent then can the Legislature 'influence' judicial power.

The role of the Legislature

I **[121]** The role of the legislature is to make law. The role of the judiciary in turn is to interpret the law. Now, what exactly 'make law' means and entails has been an unresolved jurisprudential topic for years. It is sometimes said that judges do make law especially in tort by the invention of new causes of action or the modification of old ones. This is where Edgar FCJ's reference to

'legislative intervention' in *Rama Chandran* is relevant. Where certain decisions or causes of action are developed by the courts, the legislature may choose to intervene to regulate, insert or delete entirely certain causes of action. For example, the law of defamation was primarily governed by common law until its eventual partial regulation by the Defamation Act 1957. Another example is s 8 of the Singapore Civil Law Act (Cap 43) which abolishes the common law rule established in *Bain v Fothergill* (1874) LR 7 HL 158 for contracts made on or after 1 January 1999, and not the ruling or the case itself.

[122] In fact, the Legislature may prescribe specific procedures or erect procedural barricades consistent with access to justice. 'Life' and 'personal liberty' guaranteed by art 5(1) of the FC cannot be taken away 'save in accordance with law'. Limitation laws and the equitable principle of laches as they presently stand validly place a reasonable limit (both legislative and judicial) on the vast array of causes of actions available to a litigant in civil cases while at the same time ensuring that a defendant is not perpetually at fear of suit by a litigant who has callously slept on his rights. Or as Lindley LJ put it in *Allcard v Skinner* (1887) 36 Ch D 145 (p 188), '… ignorance which is the result of deliberate choice is no ground for equitable relief; nor is it an answer to an equitable defence based on laches and acquiescence'.

[123] Apart from laches, statutory limitation is an area in which the Legislature has some province. Aptly illustrating this is the list of laws on limitation including the Limitation Act 1953 and the Civil Law Act 1956. It was argued in *Lee Lee Cheng (f) v Seow Peng Kwang* [1960] 1 MLJ 1 that the courts, under the Schedule to the CJA 1964 have the power to enlarge the statutory time limit in s 8(5) of the Civil Law Act 1956. The Court of Appeal rejected the argument on the basis that there is a distinction between 'jurisdiction' and 'power'. The power to extend time did not mean that the courts have the power to use judicial power in a manner contrary to legislation. According to Thomson CJ at p 3:

> Clause 77 of the Agreement provides that the Supreme Court shall be a Court of unlimited jurisdiction, that it shall consist of a High Court and a Court of Appeal and that its constitution, powers and procedure may be prescribed by Federal Ordinance. Clearly here 'jurisdiction' must mean something different from 'power'. Jurisdiction is unlimited. But unlimited jurisdiction cannot mean unlimited power because as regards the powers of the Court it is provided that these may be prescribed by Federal Ordinance and in the nature of things something which is unlimited cannot be capable of being prescribed. This leads to the conclusion that the expression 'jurisdiction' is used as meaning the authority of the Court to exercise any judicial power that is given to it by the law and that when the Clause says that jurisdiction is unlimited it means that there is authority to exercise such judicial power as is given by law in any type of matter whatsoever in which the law authorises or requires judicial power to be exercised.

[124] It simply means that while the High Courts have unlimited jurisdiction, the powers exercisable within such jurisdiction are circumscribed by legislation. In essence, the role of the legislative branch is to facilitate the process and to pave the path. In this vein, I have three observations as to what the legislative branch cannot do.

[125] Firstly, it cannot eliminate judicial review entirely. It can however, with the view to avoid judicial review, provide an appeal process as an alternative remedy. In such cases, if judicial review is pursued, the courts retain the discretion not to entertain the review and instead require the party to exhaust the appeal process as an alternative efficacious remedy (see *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2009] 1 MLJ 555).

[126] Secondly, and as discussed earlier, the Legislature is not permitted to prohibit absolutely the right to remedies to the extent that the process of judicial review is rendered nugatory. In drawing a balance, as culled from Edgar FCJ's view in *Rama Chandran*, the remedies can be developed and modified (including procedurally) by the Legislature but this is not the same as saying that the sufficiency of remedies is entirely in the hands of Parliament. It must be remembered that granting the appropriate relief is a central tenet of the inherent jurisdiction of review of the superior courts which is itself a basic feature of the FC.

[127] Thirdly, and perhaps on a more philosophical note, is that because the Legislature is not supreme it cannot purport to enact law to the extent of reversing judicial decisions. Or, similarly, it cannot purport to make judicial decisions through legislation. One example of this is seen in the eradication of the antiquated concept of 'bills or acts of attainder', that is, acts passed for the purpose of legislatively convicting persons without the benefit of a judicial determination and decision on the same. In the same vein, a law can be passed to change the basis of a judicial decision but a law cannot be passed to change the judicial decision itself with the hopes of a different legal or factual outcome. The earlier reference to the Singapore's abolition of the rule in *Bain v Forthergill* is one example. The decision of the Indian Supreme Court in *ST Sadiq v State of Kerala and others* (2015) 4 SCC 400 ('ST Sadiq') is another clear illustration.

[128] Briefly, the facts in *ST Sadiq* were these. The Government of the State of Kerala had attempted to acquire ten Keralan cashew factories and accordingly issued acquisition notices to that effect. The ten factories petitioned the Supreme Court of India on the ground that the said notices did not comply with the requirements of the relevant legislation. The Supreme Court of India agreed and quashed the order of acquisition. Subsequently, the State Government of Kerala passed an amendment Act prescribing that it was expedient in the public interest to acquire the said ten factories

notwithstanding, inter alia, any judgment, decree or order of any court, tribunal or other authority. The ten Keralan cashew factories challenged the validity of the amendment Act. The question before the Supreme Court of India was whether the amendment Act, in purporting to revive the notices previously declared invalid by it, was permissible. The Supreme Court of India decided that it was not. Nariman J held as follows:

> [13] It is settled law by a catena of decisions of this Court that the Legislature cannot directly annul a judgment of a court. The legislative function consists in 'making law' (see Article 245 of the Constitution) and not in 'declaring' what the law shall be (see Article 141 of the Constitution). If the Legislature were at liberty to annul judgments of courts, the ghost of bills of attainder will revisit us to enable Legislatures to pass legislative judgments on matters which are inter partes. Interestingly, in England, the last such bill of attainder passing a legislative judgment against a man called Fenwick was passed as far back as in 1696. A century later, the US Constitution expressly outlawed bills of attainder (see Article 1 Section 9).
>
> [14] It is for this reason that our Constitution permits a Legislature to make laws retrospectively which may alter the law as it stood when a decision was arrived at. It is in this limited circumstance that a Legislature may alter the very basis of a decision given by a court, and if an appeal or other proceeding be pending, enable the Court to apply the law retrospectively so made which would then change the very basis of the earlier decision so that it would no longer hold good. However, if such is not the case then legislation that trenches upon the judicial power must necessarily be declared to be unconstitutional.

[129] In light of the principles of constitutionalism embedded in art 4(1), the laws the Legislature can and cannot make is governed by a set constitutional spectrum. On the extreme left of that spectrum we have 'laws' which purport to exclude judicial review before any court including the substantive right to grant remedies for effective relief to uphold the cause of justice and the Rule of Law. Such laws are unconstitutional. In this area, there can be no risk of judicial supremacy given the range of judicially imposed controls on judicial power. On the extreme right of the spectrum we have 'laws' which seek to directly usurp the judicial role by either legislatively determining the specific legal outcome on the facts of a given case (such as with bills of attainder) or which seek to directly annul judgments of the court to alter the legal result from what was judicially determined between parties. Such laws are also constitutionally invalid. In the middle of the two extremes we have the penumbral zone where the Legislature can enact laws going to jurisdiction, substantive legal rights and procedure as may be prescribed by the legislative entries in the Ninth Schedule subject to Part II of the FC or any other constitutional checks, for example, Part XI (arts 149–151).

[130] On the foregoing analysis, s 59A of Act 155 appears to fall within the extreme left of the spectrum and is accordingly unconstitutional.

Question 1

[131] Question 1 concerns the validity of the travel ban imposed on the appellant and it rests on the following three related sub-questions:

(a) whether the travel ban, on the facts, was lawfully imposed under the circular;

(b) next, apart from the circular, whether the law generally allowed the respondents to impose the travel ban; and

(c) finally, even if the law allowed imposition of the travel ban, whether the travel ban was nonetheless pursuant to a valid law.

The circular

[132] Dato' Sri Haji Mustafa bin Haji Rahim in an affidavit affirmed on 18 January 2017 on behalf of the seconnd respondent averred as follows:

> [8] Merujuk kepada perenggan 20 Afidavit Pemohon No. 1, saya sesungguhnya menyatakan bahawa walaupun seseorang itu telah dikeluarkan passport dalam satu tempoh sah laku (5 tahun) tetapi pada bila-bila masa dalam tempoh berkenaan, passport itu boleh ditahan dari digunakan untuk ke luar negara. Mekanisme yang digunakan adalah dengan memasukkan nama seseorang di dalam Sistem Senarai Syak Jabatan Imigresen mengikut kesalahan dan tempoh penangguhan. Dalam hal ini, kes Pemohon diklasifikasikan di bawah Item 3 dalam Jadual Pekeliling Imigresen Malaysia Terhad Bil. 3 Tahun 2015.

[133] Item 3 of the circular grants the first respondent the power to suspend a passport for a period of three years against any person who 'memburukkan kerajaan Malaysia/negara dalam apa bentuk atau cara sekalipun'. However, on the facts, the respondents did not suspend the appellant's passport. Instead, what they did was to 'blacklist' her to restrict her travel despite the appellant having a valid passport.

[134] Even though the circular does not spell out under which written law it was passed, learned SFC conceded during argument that the circular was made purportedly under the authority of Act 155.

[135] I have perused the circular and I cannot find anything in the document suggesting, even remotely, that the respondents have the power to 'blacklist' a person holding a valid passport apart from the specific factual situation in which they lose their passport. The idea behind blacklisting is to protect the holder in the event that their passport is lost and is susceptible to abuse by a third-party.

[136] In my view, a plain and logical reading of the circular makes short work of it. In the first place, it is unclear under what written law it purports to exist. Even if we assume for a moment that the circular has some force of law (which is doubtful), there is nothing in it to suggest that the respondents may impose a travel ban on the appellant premised on the reasons that were advanced in this case. Accordingly, I cannot conclude that the travel ban was valid if all the respondents had is the circular.

[137] Flowing from the above, the real question is whether the respondents have the authority to impose a travel ban either under Acts 155 or 150 on a person who holds a valid passport. The respondents claim they have the power to impose travel bans under the purport of ss 3(2) and 4 of Act 155, which provide respectively:

> The Director General shall have the general supervision and direction of all matters relating to immigration throughout Malaysia.
>
> The Minister may from time to time give the Director General directions of a general character not inconsistent with this Act as to the exercise of the powers and discretions conferred on the Director General by, and the duties required to be discharged by the Director General under, this Act in relation to all matters which appear to him to affect the immigration policy of Malaysia, and the Director General shall give effect to all such directions.

[138] Question 1 asks whether the power conferred on the first respondent under s 3(2), and by extension any directions made under s 4 are unfettered. With respect, the question, if read literally, is a non-starter and leads to an obvious answer. In light of the doctrine of supremacy of the FC, constitutionalism and the Rule of Law, unfettered power is a contradiction in terms because every legal power must have its legal limits (see *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, at p 148 ('Sri Lempah')). So, that cannot be the real question that question 1 seeks to ask and address. And to be fair, that is not the extent to which it was argued.

[139] *Sri Lempah* was approached and addressed purely from an administrative law angle. It was held that the state authority could not simply impose any condition they wanted at their whims and fancies even though the law generally allowed them to impose conditions. While the same principles apply here, the present case seeks to elevate the argument to a constitutional level. It will accordingly be approached in that way. Before doing so, it is important that we first appreciate the distinction.

[140] A constitutional challenge assails governmental actions or abstentions on the basis that the law which accorded the discretion was in the first place invalid or even if the general power was exercised under written law, the denial

of the right was not actually done under the auspices of 'law'. But when a case is approached from an administrative law angle, it usually concerns a review of the conduct or abstentions of the administrative body or tribunal on the usual grounds of judicial review, which as referenced earlier, are the grounds of 'illegality', 'irrationality', 'procedural impropriety' and 'proportionality'. Accordingly, the vires of the conduct (or lack of) is adjudged as against the backdrop of the statute which is in the first place valid because it complies with the procedural and substantive requirement of what 'law' should be.

The Federal Court's decision Government of Malaysia & Ors v Loh Wai Kong [1979] 2 MLJ 33 and the right to travel

[141] In this context, the appellant's argument is that firstly, the right to travel abroad is a fundamental right. Secondly, and accordingly, the right cannot be stripped away 'save in accordance with law'. Here, the argument is that Act 155 does not by clear language authorise the respondents to impose travel ban. There is thus, according to the appellant, effectively no law allowing the respondents to impose the travel ban. I therefore need to address the question from this context that is, whether the right to travel abroad is a fundamental right and secondly, whether the respondents had the legal power to curtail it.

[142] As stated earlier, the learned High Court judge relied on the authority of *Loh Wai Kong* (FC), to hold that the government may restrict the right to travel abroad. It is perhaps appropriate to discuss the decision of Gunn Chit Tuan J (as he then was) in *Loh Wai Kong v Government of Malaysia & Ors* [1978] 2 MLJ 175 ('*Loh Wai Kong* (HC)') and its fate on appeal before the Federal Court.

[143] In *Loh Wai Kong*, the applicant, a Malaysian citizen held a Malaysian passport and was granted a resident visa which entitled him to reside permanently in Australia. He returned to Malaysia from Australia to take up employment and upon his return, the Australian authorities indorsed his passport with 'Authority to Return to Australia'. Eventually, he was charged with two separate offences; one at the sessions court and the other at the magistrate's court. His passport was impounded at the magistrate's court but was eventually returned to him when he was placed on bail. The applicant's passport expired and he sought to renew it so that he could have his new passport stamped by the Australian immigration authorities with the same phrase 'Authority to Return to Australia'. At the Immigration Department, he was informed that his name was blacklisted by virtue of the charges levied against him and his request to renew his passport was accordingly denied.

[144] Gunn J observed, on the authority of the majority judgment of the Indian Supreme Court in *Satwant Singh Sawhney v Ramarthnam, Assistant*

Passport Officer, New Delhi & Ors AIR 1967 SC 1836 ('Satwant Singh') that the right to travel abroad is a fundamental right guaranteed by art 21 of the Indian Constitution (the equivalent of our art 5). His Lordship's observations are as follows, at p 178:

> Having considered the arguments of counsel for the applicant and of counsel for the respondents and both the majority and minority judgments in the said *Satwant Singh*'s case, I would prefer with respect to follow the majority judgment which is the decision of the Indian Supreme Court in that case. In my humble opinion, Clause (2) of Article 9 of our Constitution only guarantees to every *citizen* the right to move freely throughout Malaysia and to reside in any part thereof. Our Constitution naturally cannot guarantee freedom of movement to every citizen or to any person in territories outside Malaysia. Article 5(1) of our Constitution is not only applicable to citizens but also guarantees the liberty of *any person* including non-citizens whilst in this country. The expression 'personal liberty' must therefore be liberty to a person not only in the sense of not being incarcerated or restricted to live in any portion of the country but also includes the right to cross the frontiers in order to enter or leave the country when one so desires. Refusal or withdrawal of one's passport should therefore not be seen so much as affecting the right of a person to travel abroad but should be considered, in my view, in the light of whether there is violation of his right of personal liberty under Article 5(1) of our Constitution.

[145] The learned judge however held that on the facts, he was not entitled to grant the applicant the relief sought because the applicant had not complied with the requirements of the provisos to s 44 of the Specific Relief Act 1950. In particular, the power of the government to withhold the renewal of passports was a discretionary one despite the absence of an express written law granting them the right. Accordingly, the learned judge dismissed the action.

[146] Despite winning in the High Court, the government (presumably dissatisfied with the observations that the right to travel abroad is a fundamental right) appealed to the Federal Court culminating in *Loh Wai Kong* (FC). The Federal Court purported to 'allow' the appeal on the observation that the right to travel abroad is not a right contained in art 5(1). In Suffian LP's words, travelling abroad is a privilege and not a right (at p 36).

[147] There are several observations to be made about the judgment of the Federal Court in *Loh Wai Kong*. The first observation is that the principle purportedly expounded in the case, and as relied on by the respondents, is entirely irrelevant to the facts of the instant appeal. The issue in that case concerned the government's refusal to renew a passport and not the imposition of a travel ban on a citizen who already possesses a valid and fully functional passport.

[148] Secondly, the judgment of the English Courts in *Lake v Lake* [1955] 2 All ER 538 sets out a general principle that a party may only appeal against the

judgment of the court and not the 'reasons for the judgment of the Court'. In other words, what may be appealed against is the decision and not any 'statement' or 'finding' of the written judgment. A party which has won cannot therefore appeal against a decision which was given wholly in his or her favour. The principle in *Lake v Lake* has been endorsed and applied by this court in *Dato' Seri Anwar Ibrahim v Tun Dr Mahathir bin Mohamad* [2011] 1 MLJ 145. The appeal by the government in *Loh Wai Kong* (FC) was thus incompetent and the findings of the Federal Court in that case were therefore made without jurisdiction. The holding that the right to travel abroad is a privilege and not a fundamental right, is not therefore a binding precedent.

[149] In a case with facts very similar to the present one, the Court of Appeal in *Pua Kiam Wee v Ketua Pengarah Imigresen Malaysia & Anor* [2018] 6 MLJ 670, relied on the authority of *Loh Wai Kong* (FC), in holding that the right to passport is not a fundamental right envisaged in art 5(1) and that it is instead a privilege. The judgment of the Court of Appeal therefore suffers the same infirmities and the matter of whether the right to travel is a fundamental right bears reconsideration.

[150] At this stage, the following is clear; that upon the two aforementioned bases, *Loh Wai Kong* (FC) is of no utility to the respondents. To recapitulate, the case is entirely distinguishable on the facts. Secondly, the principles of law and the findings which followed were made without jurisdiction. They must then be deemed to be non-existent. It must then also follow that the reliance by the learned judge of the High Court on *Loh Wai Kong* (FC) was, with respect, similarly misplaced. On this basis alone, the judgment of the High Court is liable to be set aside. Given the outcome, the wider implication is that *Loh Wai Kong* (FC) does not serve as a useful guide on how the constitutional issue raised in this case on the travel ban is to be addressed.

Whether the right to travel abroad is a fundamental right

[151] Without being too verbose, in construing the FC provisions in Part II, several principles must be borne in mind (as replete in past landmark decisions). And without having to state the cases from which they arise, these overarching constitutional principles which apply throughout this judgment, may be summarised as follows:

(a) a constitution is a document *sui generis* and governed by its own interpretive principles. It is a living and organic document constantly evolving and must therefore be construed with less rigidity and more generosity than mere Acts of Parliament and other written laws;

(b) more specifically, constitutional provisions and laws which safeguard fundamental rights must be read generously and in a prismatic fashion while provisions that limit or derogate from those rights must be read restrictively; and

(c) judicial precedent plays a lesser part than in normal matters or ordinary statutory construction.

[152] Now, even if we were to apply *Loh Wai Kong* (FC), it is my view that the overall development of constitutional jurisprudence in this country has significantly watered down the effect of the views of the former Federal Court in that case. At p 36, Suffian LP had this to say as regards art 5(1):

> To sum up, 'personal liberty' in Article 5 means liberty relating to or concerning the person or body of the individual; that article does not confer on the citizen a fundamental right to leave the country. On the contrary, the government may stop a person from leaving the country if, for instance, there are criminal charges pending against him. Article 5 does not confer on the citizen a fundamental right to travel overseas.
>
> Article 5 does not confer on the citizen a right to a passport. The government has a discretion whether or not to issue, delay the issue of or withdraw a passport: for instance, if criminal charges are pending against the applicant. The exercise of this discretionary power is subject to review by a court of law. Only a citizen may apply for a passport.

[153] The former Federal Court afforded art 5(1) a narrow construction and reduced the case from a constitutional challenge to one of an administrative law. With respect, the narrow construction could no longer withstand the powerful force of the river current that represents our present day constitutional law and theory. In any event, any doubt there may be as to the pervading force of art 5(1) as the lynchpin of all fundamental liberties, or that all fundamental liberties must be read in tandem, has been put to rest by this court in *Alma Nudo*, where it was held that:

> [98] ... art 5(1) is the foundational fundamental right upon which other fundamental rights enshrined in the FC draw their support. Deprived (*sic*) a person of his right under art 5(1) the consequence is obvious in that his other rights under the FC would be illusory or unnecessarily restrained. In fact deprivation of personal liberty impacts on every other aspect of human freedom and dignity (see *Maneka Gandhi v Union of India* 1978 AIR 597). But at the same time art 5(1) is not all-encompassing and each right protected in Part II has its own perimeters. Hence, the provisions of the FC should be read harmoniously. Indeed the fundamental liberties provisions enshrined in Part II of the FC are parts of a majestic, interconnected whole and not each as lonely outposts.

[154] Does the right to travel therefore fit under the umbrella of 'life' and 'personal liberty'? This is accordingly the prime question upon which question 1 rests. To understand the significance of this, it is necessary to appreciate two pronouncements of the Indian Supreme Court in *Satwant Singh*, and in *Maneka Gandhi v Union of India* 1978 AIR SC 597; (1978) 1 SCC 248 ('Maneka Gandhi').

[155] The decision in *Satwant Singh* was split three to two with Subba Rao CJ, Shelat and Vaidialingam JJ in the majority and Hidayatullah and Bachawat JJ in dissent. The facts were explained differently by the majority judgment while the minority judgment indicated more ominous undertones as regards the petitioner's conduct and thus his right under the Indian Constitution. In my opinion, the view taken by the minority judges on the petitioner's right of locomotion being implied in art 21 of the Indian Constitution was somewhat coloured by the facts that they observed. Be that as it may, as will be seen later, the more liberal views held by the majority on the right to travel eventually received unanimous approval from a seven-member Bench in *Maneka Gandhi* and thus there is reason to attach considerable weight to the majority judgment in *Satwant Singh* in spite of what the complete facts of that case might otherwise suggest.

[156] With that qualifier, the situation in *Satwant Singh* may be summarised thus. The petitioner was in the business of exporting, importing and engineering automobile parts. For purposes of his trade, it was necessary for him to make constant travels abroad and he was issued with passports to travel to various countries. He was subsequently asked to surrender two of his passports to the relevant authorities upon order from the Government of India, while suggesting that appropriate action would be taken against him should he fail to do so. The petitioner wrote two letters to the persons concerned but received no reply. He accordingly filed a writ petition in the Supreme Court seeking mandamus against them to cancel their letters requiring the surrender. The minority highlighted that the majority failed to consider the fact that he had also been using his various passports for fraudulent purposes.

[157] Whatever the case, the prime question before the Supreme Court was essentially whether the government's request to surrender the passport was lawful. This necessitated the question of whether the right to travel abroad is a fundamental right and thus whether it could be taken away absent any written law to the effect suggesting that the government had the discretion to withdraw passports.

[158] Subba Rao CJ pertinently noted that the words 'personal liberty' in art 21 of the Indian Constitution are different from the lone word 'liberty'. On the authority of the Indian Supreme Court judgment in *Kharak Singh v State of UP*

& Others 1964 SCR (1) 332, the word 'personal' is used to qualify 'liberty' to avoid an overlap between the general use of the word 'liberty' which encapsulates the other rights contained in the constitution such as freedom of speech etc. This is because the header to Part III of the Indian Constitution (like our Part II) provides for 'Fundamental Liberties'. Ignoring the word 'personal' attached to 'liberty' would therefore render the word 'personal' otiose. 'Personal liberty' encompasses the residual source of rights which are not already covered by the other enumerated fundamental liberties provisions. *Kharak*'s case saw the Indian Supreme Court holding that art 21 of the Indian Constitution guarantees the right to privacy as part of the right to 'personal liberty' though art 21 makes no mention of the word 'privacy'.

[159] The court also referred to the jurisprudence of the American courts which were decided on the basis of the Fifth Amendment (in particular) which guarantees, inter alia, the right of liberty which may only be deprived in accordance with the due process of law. Of significance were the following two judgment of the US Supreme Court in *Williams v Fears* 45 Law Ed 186 and *Boundin v Dulles* 136 F Supp 218. The observations made are germane to the facts of the present appeal and for reasons that should soon become clear, I fully endorse them.

[160] In the former case, Chief Justice Fuller observed at p 274, that:

> Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.

[161] In the latter case, Youngdahl J observed at p 219, as follows:

> It must now be accepted that travel abroad is more than a mere privilege accorded American citizens. It is a right, an attribute of personal liberty, which may not be infringed upon or limited in any way unless there be full compliance with the requirements of due process.

[162] In *Satwant Singh*, Subba Rao CJ accepted that the term 'personal liberty' is wide enough to encompass the residual right of locomotion across the borders of India. In the words of the learned Chief Justice, the significance of the right is borne out by the fact that:

> 32. ... a person may like to go abroad for many reasons. He may like to see the world, to study abroad, to undergo medical treatment ..., to collaborate in scientific research, to develop his mental horizon in different fields and such others.

[163] It was thus held by the Supreme Court that the government's discretion to withdraw passports thereby impinging on an individual's right to personal

liberty, was unlawful and that it also violated art 14 of the Indian Constitution (our art 8(1)) as the discretion, not being governed by any law, was 'unchannelled and arbitrary' (Subba Rao CJ, [33]). The remedy of mandamus was therefore granted.

[164] In short, the above compendiously sums up the very notion of the quality of life itself which, as observed earlier in this judgment, means more than mere animal existence. The vast migrations we have witnessed in history is testament to the fact that locomotion plays an inalienable part in the growth of every human being, whether physically, mentally or spiritually, and that the guarantee of the right to travel is itself the very guarantee of the quality of life and personal liberty. 'Life' and 'personal liberty' can be deprived according to procedure established by law (India, art 21) or 'in accordance with law' (our art 5(1)). It will be noticed that ours is a broader provision.

[165] With that backdrop, we can now appreciate the decision of the Indian Supreme Court in *Maneka Gandhi*.

[166] The leading judgment of the case is that of Bhagwati J. In the judgment, His Lordship explains the result of what happened in *Satwant Singh*. The Indian Parliament, realising that it did not have clear authority under written law to channel its discretion to regulate passports, passed the Passports Act 1967. Under the Act, the government was allowed, inter alia, under s 10(3)(c) to impound a passport 'in the interests of the general public'. The petitioner, a journalist, received a letter from the government requiring her to surrender her passport within seven days. The petitioner wrote back immediately demanding reasons but was informed that no reasons will be given on accord of the matter being 'in the interests of the general public'. The petitioner filed an action before the Supreme Court challenging the validity of the order and of s 10(3)(c).

[167] Ultimately, the Supreme Court made no order on the substantive validity of the government's order against the petitioner because the attorney general, during the course of argument, made a statement that the government was agreeable to consider any representation that may be made by the petitioner and that it would give her such an opportunity to make the case why her passport ought not to be impounded. The Supreme Court was also satisfied that on the grounds disclosed by the government during the hearing, the prime reason why the petitioner's passport was sought to be impounded was because she may have been required to attend as a witness before a Commission of Inquiry and that on some intelligence reports, there was an indication that she might have fled were she to be summonsed. The court accepted these reasons. Regardless, it is the court's views on the interpretation of 'personal liberty' that

concerns me, and its opinion on the right to natural justice, which will be expanded in greater detail when we come to question 2.

[168] With no intention to do injustice to the expansive views of Bhagwati J, His Lordship's views on art 21 (our equivalent of art 5) may be summarised thus (as garnered from pp 277–280):

(a) fundamental rights conferred by Part III (our Part II) are not distinct and mutually exclusive rights. Each freedom has different dimensions and merely because the limits of interference with one freedom are satisfied, the law is not freed from the necessity to meet the challenge of another guaranteed freedom;

(b) the attempt of the court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction;

(c) the expression 'personal liberty' in art 21 is of the widest amplitude and it covers a vast variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights; but that said; and

(d) certain freedoms are not and cannot be absolute and unrestricted freedom may be destructive. In a well-ordered, civilised society, freedom means regulated freedom.

[169] On the above foundational ideas, Bhagwati J observed that the right to travel abroad is contained in the general right of personal liberty protected by art 21. His Lordship, as did the rest of the panel in the seven-member Bench, endorsed the majority view in *Satwant Singh*.

[170] It is true that our Constitution must be interpreted in its own right and context given that it was drafted in circumstances unique to our political and legal history. But when it comes to fundamental liberties, apart from where the language or context of the black letter is itself inconsistent with such pervasive norms, I see no basis to deviate from something which is common ground. It will be recalled that our FC, especially Part II, was drafted upon inspiration from our American and Indian counterparts.

[171] In my view, where a right is not expressly enumerated in one particular article, it may be housed in the generic words of 'life' and 'personal liberty' in art 5(1). And, just because one liberty is already provided for in one article, it does not mean that another article in Part II cannot enlarge the scope of that first-mentioned right. Or just because a particular right is not expressly provided for in an article, that right is excluded. For example, while the right to privacy is not expressly enumerated in the Indian Constitution and the FC,

Indian and Malaysian jurisprudence now accept it as part of art 21 and art 5(1) respectively (see *Navtej Singh Johar and Ors v Union of India* (2019) 1 SCC (Cri) 1; *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 ('Sivarasa Rasiah'); and *Muhamad Juzaili bin Mohd Khamis & Ors v State Government of Negeri Sembilan & Ors* [2015] 3 MLJ 513).

[172] Grounded on high authority, I am therefore of the view that 'personal liberty' in art 5(1), read prismatically and purposively, encompasses the right to travel abroad. I am persuaded to accept this for the reason that a Constitution is a living and organic document. Though judges are by nature reclusive, they can hardly afford to be blind to the realities of life.

[173] Having held that the right to travel abroad is a fundamental right guaranteed to all persons under art 5(1) of the FC, I will now proceed to examine the constitutionality of the travel ban. Before I do so, it would be useful to lay out the formula (using the term loosely) for examination of the constitutionality of State action. Culled from the authorities both local and foreign (specifically *Satwant Singh* and *Maneka Gandhi*), when assessing the constitutionality of executive or legislative action, the courts should ask the following three questions:

(a) firstly, is the breach complained of a breach of a fundamental right? in this assessment, the courts must evaluate Part II holistically and not piecemeal.

(b) secondly, if the breach strikes to a fundamental right, the next question is whether the breach was mandated by law. As gathered from *Maneka Gandhi*, freedom means regulated freedom. So, not all breaches of fundamental rights are per se unlawful if they are provided for by law. Naturally thus, if the breach was not then sanctioned by any written law, the executive action is *a fortiori* unlawful. The reason is because 'if a law does not lay down a clear policy and leaves it to the unfettered and unregulated discretion of the executive to apply the special procedure created by it to any person or group of persons at its will and pleasure, such law is a clear negation of art 8(1). The mischief lies in the fact that in the absence of any regulative principle or policy, the uncontrolled discretion of the executive is the sole determining factor for the application of that law' (Abdoolcader J, *Harun Idris*); and

(c) thirdly, if the breach is sanctioned by law, the final assessment is whether the law itself is valid. A law is invalid if it is arbitrary, unfair or oppressive. This last point is also inspired by art 8(1) in that even if a law is passed by Parliament in compliance with all the procedures, the law may nonetheless be invalid if it fails to meet the requirements of the FC. Tying this to what was said earlier, the purpose of the Legislature and legislation is not simply to statutorily validate discriminatory use of

power but to channel and guide the use of the power or discretion within the purview of the FC. The validity question is always approached by first presuming that the law is constitutional and it is for the challenger to show that it is not.

[174] Having ascertained that the right to travel abroad is a fundamental right guaranteed by art 5(1), it is obvious on the facts that the appellant's right has been breached. That therefore meets the assessment of the first limb and I will now proceed to the second limb.

Legality of the travel ban

[175] It was the respondents' submission that ss 3(2) and 4 of Act 155 confer on them the power to impose the travel ban. The appellant submitted that the statutory provisions are too vague to even remotely suggest that the respondents have such a power and that in any event, applying the maxim of *expressio unius est exclusion alterius* (the expression of one thing excludes others), Act 155 never envisioned such a power. It must be clarified here that in undertaking this analysis, it is not the case that the said ss 3(2) and 4 are unconstitutional, rather that they do not sufficiently provide for the power to impose a travel ban.

[176] The words used in s 3(2) are 'general supervision and direction of all matters relating to immigration'. The section itself only envisions 'general supervision'. Section 4 similarly only allows the first respondent the power to issue directions of a 'general character'. There is nothing specific enough in the two sections which suggest firstly, how and when the respondents may restrict the fundamental right of a person to travel abroad. This is in contrast to *Maneka Gandhi* where the Indian Parliament expressly enacted specific procedure for cases where they may impound passports. The facts are different from the present appeal but principally, the concept is the same. So, on a literal construction, ss 3(2) and 4 of Act 155 are no answer to the travel ban.

[177] Next, by applying *unius est exclusion alterius*, the appellant contrasted ss 3(2) and 4 with other sections in Act 155 to ultimately conclude that there is no indication of Parliamentary intention to confer on the respondents the power to impose a ban on international travel. The appellant made reference to the following powers conferred by Act 155 which suggest that the power to impose international travel bans are excluded from the broader language of ss 3(2) and 4. Act 155 allows the respondents to:

(a) restrict foreigners from entering Malaysia (ss 6, 9, 9A, 10, 12 and 15);

(b) control the manner in which a citizen or foreigner is to enter or depart from Malaysia (s 5);

(c) restrict the manner in which foreigners or foreign vessels depart from Malaysia (ss 17 and 31);

(d) restrict citizens from entering East Malaysian States (s 66);

(e) restrict foreigners from remaining in Malaysia (s 15); and

(f) investigate, detain and prosecute citizens and foreigners for immigration offences (ss 35, 39 and 51).

[178] Learned counsel for the appellant also submitted that the power to impose a travel ban on international travel is similarly absent in the provisions of Act 150. He drew our attention to s 2 and made the same argument that it stops short of suggesting that the respondents have the power to impose a travel ban like the one imposed on the appellant. Section 2(2), 2(3) and 2(4) of Act 150 provide as follows:

(2) Every person leaving Malaysia for a place beyond Malaysia shall, if required so to do by an immigration officer produce to that officer a passport.

(3) An immigration officer may, in relation to any passport produced under this section, put to any person producing that passport such questions as he thinks necessary; and the person shall answer the questions truthfully.

(4) An immigration officer may make on any passport produced under this section such endorsement as he thinks fit.

[179] Learned counsel for the appellant then proceeded to refer us to s 104 of the Income Tax Act 1967 which in the circumstances enumerated in that section, allows the first respondent to essentially impose a travel ban. For convenience, the section provides, as follows:

104(1) The Director General, where he is of the opinion that any person is about or likely to leave Malaysia without paying —

(a) all tax payable by him (whether or not due or due and payable);

(b) all sums payable by him under subsection 103(1A), (3), (4), (5), (6), (7) or (8) or subsection 107B(3) or (4) or subsection 107C(9) or (10); and

(c) all debts payable by him under subsection 107A(2) or 109(2), 109B(2) or 109F(2),

may issue to any Commissioner of Police or Director of Immigration a certificate containing particulars of the tax, sums and debts so payable with a request for that person to be prevented from leaving Malaysia unless and until he pays all the tax, sums and debts so payable or furnishes security to the satisfaction of the Director General for their payment.

[180] After addressing us on the above provisions, learned counsel referred us to various authorities for the proposition that fundamental liberties cannot be curtailed unless upon clear and express dictate of Parliament. It is sufficient to state just one of those authorities being the recent judgment of this court in *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [2020] 1 MLJ 141. There, Zawawi Salleh FCJ, after referring to settled authorities concluded that 'fundamental rights may only be disregarded if clear and express words of the Legislature permit such abrogation'.

[181] There is thus much force in the assertion by learned counsel for the appellant that by applying the settled cannons of statutory construction, and in light of the constitutional principle that all executive action must be mandated by law, the travel ban is unlawful. Learned counsel's reading of the sections is correct and quite clearly suggests that there is no positive provision of law, setting out clearly and unequivocally that the respondents have the right to impose the travel ban on the appellant. And, for reasons stated earlier, the circular is certainly no such authority.

[182] For the foregoing reasons, I conclude that there is no law in place to allow the respondents to impose the travel ban. The act of the respondents in imposing the travel ban runs afoul of the second limb of the assessment of constitutionality of State action which was elaborated earlier.

[183] In the premises, question 1 is answered in the negative.

[184] The appellant had also raised other objections against the travel ban specifically in relation to the breach of her rights to free speech and expression under art 10(1) and that the travel restriction imposed on her is invalid under art 10(2) as not being imposed by a law passed by Parliament. Learned counsel submitted that the breach is a disproportionate incursion into the appellant's rights to free speech and expression. With respect, and save for my general observations on proportionality later into this judgment, I find it unnecessary to consider these issue for two reasons. Firstly, the views I have expressed on the appellant's rights under art 5(1) have sufficiently dealt with the legality of the travel ban. There is thus no need to assess its validity under art 10 of the FC. Secondly, the discussion on question 2 covers the arguments on due process including the point on proportionality.

Question 2

[185] In posing question 2, the appellant seeks to argue that s 59 of Act 155 is unconstitutional. The section reads:

A No person and no member of a class of persons shall be given an opportunity of being heard before the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, makes any order against him in respect of any matter under this Act or any subsidiary legislation made under this Act.

B **[186]** The argument is premised on the system of law articulated thus by Lord Diplock in *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64; [1980] 1 LNS 181 ('Ong Ah Chuan') at pp 70–71:

C ... So the use of the expression 'law' in Articles 9(1) and 12(1) does not, in the event of challenge, relieve the court of its duty to determine whether the provisions of an Act of Parliament passed after September 16, 1963 and relied upon to justify depriving a person of his life or liberty are inconsistent with the Constitution and consequently void.

D In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law' in such contexts as 'in accordance with law', 'equality before the law', 'protection of the law' and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England E that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to F speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by Article 5) of Articles 9(1) and 12(1) would be little better than a mockery.

[187] The above passage was cited with approval by the Federal Court in *Che* G *Ani bin Itam v Public Prosecutor* [1984] 1 MLJ 113 at pp 114–115.

[188] In simpler terms, natural justice which encapsulates the twin concepts of *nemo judex in causa sua* (the rule against bias) and *audi alteram partem* (the right to be heard), are integral features of a written constitution which protects H fundamental liberties. Both rights are equally important but for the purpose of this judgment, particular emphasis is given to the right to be heard. On that right, Bhagwati J observed in *Maneka Gandhi* that 'the soul of natural justice is fair-play in action and that is why it has received the widest recognition throughout the democratic world'.

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[189] Natural justice here is not therefore natural justice in the administrative law sense of the term. Administrative natural justice relates to situations where there is a breach of some right by the administrative branch. Constitutional natural justice refers to the validity of the law passed, that is, whether the law is

not unfair, arbitrary or oppressive. On the distinction, see generally *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189; [2011] SGCA 9. Procedural fairness, which is another way of saying constitutional natural justice, is embedded in arts 5(1) and 8(1).

[190] The issue here is, even if there is a law that validly restricts the right to travel, whether the said law can go to the extent of removing natural justice from the equation. The point relates to the earlier analogy that the role of the Legislature is not merely to validate arbitrary exercise of discretion but that it must channel and guide the use such discretion. The right to be heard aspect of natural justice is a perfect example of, and effectuates the equal protection provision of art 8(1) of the FC. Where the law restricts a fundamental right, the discretion and direction the said law imposes on the administrative decision-maker restricts his discretion to a degree that ensures that he applies his mind to the facts of a given case. To paraphrase the Privy Council's observation in *Matadeen v Pointu* [1999] 1 AC 98 at p 109, per Lord Hoffmann: 'equality before the law' is one of the building blocks of democracy and necessarily permeates any democratic constitution and that it requires treating like cases alike and unlike cases differently as a general axiom of rational behaviour.

[191] To recapitulate *Maneka Gandhi*, the petitioner argued that s 10(3)(c) of the Indian Passports Act 1967 was unconstitutional because it was vague and that it did not grant the petitioner a right to be heard. The vagueness point was buttressed on the contention that the words 'in the interests of the general public' were uncertain. Even in the course of argument, the Attorney General of India attempted to justify the exclusion of the right to be heard on the basis that if notice were to be given to the holder of the passport and reasonable opportunity afforded to her to show cause why her passport should not be impounded, then the passport holder might immediately abscond.

[192] On the first point, as regards vagueness, Bhagwati J noted that though the words were vague, reading the Act as a whole, a proper and fair procedure was established to afford a reasonable opportunity to the passport holder to be heard. The relevant sections of the Indian Passports Act 1967 require that where the government found it necessary to impound a passport, it would have to communicate its reasons to the passport holder so affected.

[193] On the second point, His Lordship noted that the right to be heard is 'flexible' and that it cannot be degenerated into a series of hard and fast rules. In this sense, in each and every case, what the court must first be satisfied with is that the right to be heard is afforded no matter the form in which it was afforded. This is what makes it 'flexible'. Depending on the case, it can be a full-fledged hearing or it may be a very brief one, or it may also be a post

decisional remedial hearing. In this regard, Malaysian courts have upheld that in certain cases oral hearings, depending on the case, may not be necessary and that hearings by way of written representations suffice (see *Najar Singh v Government of Malaysia & Anor* [1976] 1 MLJ 203; [1976] 1 LNS 81 and *Sobri*).

[194] In *Maneka Gandhi*, the Indian Supreme Court declined to rule on the validity of the government's impounding of the petitioner's passport because the Attorney General made an undertaking that the government will afford the petitioner a right to be heard before ultimately deciding whether her passport ought to be impounded. On this front, Bhagwati J held that the statement removed the vice from the order impounding the passport and that it could no longer be assailed on the ground that it does not comply with the rule of *audi alteram partem*.

[195] The rule to be distilled from the foregoing discussion may be put thus (per Bhagwati J's observations in *Maneka Gandhi* at p 293). Where a statute vests unguided and unrestricted power in an authority which affects the rights of a person without laying down any policy or principle which is to guide the authority in exercising this power, it would be affected by the vice of discrimination since it would leave it open to the authority to discriminate between persons and things similarly situated. In this regard, the right to be heard affords 'fair-play in action' by ensuring that the decision-maker applies his mind to the facts of a given case, and to treat like cases alike and unlike cases may be treated fairly according to their facts. Procedural fairness is observed so long as the person concerned is afforded a right to a reasonable opportunity to present his case and that the hearing is a genuine one as opposed to being a mere façade or 'an empty public relations exercise' (*Maneka Gandhi* at p 291).

[196] The rule adumbrated above accords with the spirit of art 8(1) of the FC as we have always understood it. Apart from the specific limbs of discrimination expressly sanctioned by cl (5), art 8(1) does not permit discrimination unless it is founded on an intelligible differentia having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question (see *Harun Idris*, at p 117; *Mohamed Sidin v Public Prosecutor* [1967] 1 MLJ 106). The principles in respect of procedural fairness are merely a means of ensuring that not only is the legislation procedurally fair, but where the Legislature confers discretion of significant amplitude to the Executive, that such discretion, though on the face of it discriminate, may be applied as fairly as possible on the facts of each and every case.

[197] Section 59 of Act 155 leaves no room for interpretation. It unequivocally excludes natural justice and hence purports to exclude

procedural fairness guaranteed by arts 5(1) and 8(1) of the FC. It is therefore my determination that the appellant has overcome the presumption of constitutionality. For the foregoing reasons, s 59 is invalid and unconstitutional and it is hereby struck down.

[198] Question 2 is thus answered in the negative.

[199] Before leaving question 2, I wish to address two other important points. The first is on the aspect of proportionality or the substantive assessment of the validity of laws. The second is to explain why the respondents' answer in respect of question 2 cannot be accepted. This is in respect of the cases which the respondents relied on.

[200] On the first point, proportionality is derived from art 8(1) and binds in its embrace, all other fundamental liberties primarily art 5(1) in the same way procedural fairness does. Its significance and import was explained by this court in *Sivarasa Rasiah*, as follows:

> [30] ... all forms of state action — whether legislative or executive — that infringe a fundamental right must (a) have an objective that is sufficiently important to justify limiting the right in question; (b) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and (c) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve.

[201] By endorsing the views of the South African Constitutional Court in *State v Makwanyane and Another* [1995] 1 LRC 269, this court further said in *Alma Nudo*:

> [120] ... Proportionality is an essential requirement of any legitimate limitation of an entrenched right. Proportionality calls for the balancing of different interests. In the balancing process, the relevant considerations include the nature of the right, the purpose for which the right is limited, the extent and efficacy of the limitation, and whether the desired end could reasonably be achieved through other means less damaging to the right in question ...

[202] A law which purports to exclude the right to be heard would be procedurally invalid as it violates procedural fairness guaranteed by arts 5(1) and 8(1) of the FC, or, as *Ong Ah Chuan* defines it, inconsistent with the 'system of law' which those articles set out. Procedural validity serves to ensure that there are appropriate checks and balances against the arbitrary use of discretion as opposed to a blanket legislative sanction or validation for arbitrary use of discretion. Even if a law is procedurally valid, it may be substantively invalid if upon proper assessment, the law is found to be substantively discriminatory. Proportionality measures the force of the legislative or executive incursion into a fundamental liberty and weighs it against the

legitimate objective of the state. Where the incursion far outweighs the legitimate objective, it will be deemed unreasonable, oppressive or arbitrary. In such circumstances, whatever the adjective one may use to describe it, the incursion will have to be struck down on the grounds that it is a disproportionate measure violating art 8(1).

[203] To put things into perspective on how substantive fairness is applied, reference is once again made to *Alma Nudo*. There, this court had the occasion to explain that the violation of the presumption of innocence is not per se a disproportionate measure. Explaining the rationale in a different way, the state had a legitimate objective in the use of single presumptions because in certain cases, logic requires that it makes better sense that the accused would have to disprove a certain fact rather than the prosecution having to prove it. This court thus concluded at para [125], that '... we consider that the application of the proportionality test in this context strikes the appropriate balance between the competing interests of an accused and the state'. However, on the use of double presumptions, or 'presumption upon presumption', this court found it to be a disproportionate measure because it was a grave departure from the general corpus of law essentially deviating from the rule that the accused need not disprove every ingredient of the offence and that it suggested that there was no longer a need for the prosecution to prove a drugs charge beyond reasonable doubt. Hence, this court concluded, at para [150] that '... in light of the seriousness of the offence and the punishment it entails, we find that the unacceptably severe incursion into the right of the accused under art 5(1) is disproportionate to the aim of curbing crime, hence fails to satisfy the requirement of proportionality housed under art 8(1)'.

[204] It must be noted that while legislative intention is relevant in construing the law in presuming it to be constitutional, such intention is not decisive of constitutionality. This was clearly explained in *Alma Nudo* that:

> [129] It is for the court to determine whether the substance and effect of the legislation in permitting the use of double presumptions is in line with the fundamental liberties provisions of the FC.

[205] I do not read the above passage as being confined just to the facts of *Alma Nudo*. It is for the courts to interpret the law and in the constitutional context, this interpretive power extends to determining its validity whether procedural or substantive. Notwithstanding the majority judgment of this court in *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277; [2020] 8 CLJ 147, there can therefore be no question of judicial deference to Parliament save and except where the subject-matter is itself non-justiciable as may be determined by the courts.

[206] On the facts of this case, I nevertheless find no necessity to assess the substantive fairness of the travel ban imposed on the appellant given that the said ban was not lawfully imposed on the appellant by any written law, as held earlier.

[207] This brings me to the second point which the respondents raised in their written and oral submissions. They argued that in appropriate cases, Parliament may by law exclude natural justice where such intention is expressed with 'irresistible clearness'. They find support for this in the judgment of this court in *Sugumar Balakrishnan* (FC) where it was observed at pp 92 and 94:

> In our view, Parliament having excluded judicial review under the Act, it is not permissible for our courts to intervene and disturb a statutorily unreviewable decision on the basis of a new amorphous and wide ranging concept of substantive unfairness as a separate ground of judicial review which even the English courts in common law have not recognised ...
>
> ...
>
> Our answer to question no 1 is therefore that the combined effect of the exclusion of the right to be heard provided in s 59 of the said Act and the ouster clause provided in s 59A thereof has excluded review in respect of the direction given by the state authority under s 65(1)(c) on any ground except in regard to any question relating to compliance with any procedural requirement of the Act or regulations made thereunder governing that act or decision.

[208] The answer to the above passage in respect of s 59 of Act 155 is the same answer I gave earlier in respect of s 59A, that is, that *Sugumar Balakrishnan* (FC) is no longer an authority for the proposition it makes in light of the two subsequent decisions of this sourt in *Semenyih Jaya* and *Indira Gandhi*.

[209] For completeness, I will address the other main authorities cited by the respondents, namely the decision of the House of Lords in *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 ('ex parte Simms') and the judgments of the High Court of Australia in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 ('Saeed') and *Annetts v McCann* (1990) 170 CLR 596; (1990) 97 ALR 177 ('Annetts').

[210] *Ex parte Simms* concerned a blanket ban imposed on all professional journalists from accessing prisons to interview prisoners on the grounds of maintaining proper control and order. The journalists sought to interview the said prisoners because they maintained their innocence. The ban was imposed due to the ensuing fear of the Secretary of State and the prison authorities that the interviews would undermine control and order. The applicants/prisoners applied for judicial review. The High Court allowed the applicants' judicial

review on the basis that the blanket ban policy was a disproportionate incursion into the applicants' right to free speech. The Court of Appeal reversed. The matter came up before the House of Lords. By a unanimous decision, Their Lordships held that the ban imposed on the journalists from interviewing them was an unlawful incursion into the applicants' right to free speech.

[211] With respect, I cannot appreciate how *ex parte Simms* is of any use to the respondents in this appeal. It appeared that learned SFC relied on the speech of Lord Hoffmann at p 131 for the proposition that the right of natural justice including the right to be heard may be excluded by the clear dictates of Parliament. The passage need only be reproduced to glean that Lord Hoffmann's views were stated in a limited context, as follows (*ex parte Simms*, p 131):

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. *In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the Legislature is expressly limited by a constitutional document*. (Emphasis added.)

[212] Neither the above passage, nor the facts in *ex parte Simms* have anything to do with the exclusion of the right to be heard. While Lord Hoffmann did suggest that fundamental rights may be excluded upon clear statutory language to that effect, His Lordship was quick to add that such an inference is only applicable in a system that observes Parliamentary sovereignty and that the same would not be true in a system with a written constitution. Ours is a model based on constitutional supremacy and that we are governed by a 'system of law' different to that practised in England. As such, the authority of *ex parte Simms* is of no utility to the respondents in the present appeal.

[213] The other two cases cited by the respondents are *Saeed* and *Annetts*. Since *Saeed* cited and followed the previous decision of the High Court in *Annetts*, the two decisions may be taken together. In *Saeed*, the appellant, a Pakistani national sought to apply for a specific Australian visa. The relevant authority, the delegate of the Minister, discovered that some of the information provided by the appellant was fraudulent and accordingly rejected her application. Section 51A(1) of the Migration Act 1958 was challenged as being

unconstitutional on the basis that it purported to limit the right to natural justice to specific elements to which only the Act allowed. The High Court in *Saeed* endorsed the following observations of Barwick CJ in *Annetts* at p 178 where His Honour said, as follows:

> It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment ...

[214] In *Saeed*, the sourt observed upon statutory construction, that the right to be heard as was contended in the case was only excluded in respect of onshore visa applicants and not for offshore applicants. Section 57 of the Migration Act to the extent that it required the Minister to allow an applicant to comment on adverse material would therefore have to be observed. The High Court accordingly found that the decision of the Minister was unlawful because the delegate did not allow the appellant the reasonable opportunity to comment on the adverse material and as such, an important aspect of natural justice was denied to her.

[215] Though the case suggests that natural justice can be removed by Parliament, the court was nonetheless slow to arrive at such a conclusion in respect of the appellant in that case. In any event, in respect of the two cases, *Saeed* and *Annetts*, the following is my observation.

[216] Australian constitutional cases, specifically in the context of fundamental liberties, must be viewed with some caution as the Constitution of Australia does not have an express guarantee on fundamental liberties. Our FC has such provisions in Part II and is thus more reminiscent and closer in theory to the Constitutions of United States of America and India coupled with the fact that we have art 4. I would opine that any principle established by the Australian cases to the effect that procedural fairness, that is constitutional natural justice, may be excluded is completely incongruent with our FC, as ours is not a nation characterised by Parliamentary supremacy or sovereignty but by constitutional supremacy.

[217] *Ex parte Simms*, *Saeed* and *Annetts* thus lend no assistance to the respondents' case on the constitutional validity of s 9 of Act 155.

[218] Learned SFC submitted that 'section 59 of Act 155 has expressed with irresistible clearness the intention of Parliament to exclude the right to be heard'. For reasons stated earlier, this 'irresistibly clear' exclusion is incongruous with our 'system of law' which constitutionally establishes procedural fairness. The presumption of constitutionality is accordingly rebutted and s 59 stands invalid and unconstitutional.

Remedies

The appropriate order

[219] In addressing questions 1 and 2, it has been established that the travel ban imposed on the appellant was unlawful. In my answer to question 3, it is apparent that the decision of the respondents is not ousted by s 59A of Act 155 and that it remains open to the court to grant the appellant the remedies as an inherent feature of that power of review. The only question that remains is: what is that remedy?

[220] I am minded to grant the reliefs prayed for by the appellant subject to certain modifications to suit the views that I have expressed in this judgment. The orders that I grant are as per prayers 2, 3, 4, 5, 6 and 7 of the application of judicial review as follows:

(2) A *declaration* that the Impugned Decision made by the respondents to blacklist the appellant from travelling overseas in the circumstances is a breach of Article 5(1) and Article 8(1) of the Federal Constitution and is as a result, unconstitutional and void;

(3) A *declaration* that the respondents do not have the power to make the Impugned Decision and therefore acted in excess of jurisdiction;

(4) A *declaration* that the respondents do not have an unfettered discretion to arrive at the Impugned Decision;

(5) A *declaration* that the respondents cannot act under section 59 of Act 155 to deny the appellant a right to natural justice as this is in violation of the Federal Constitution in particular Article 160 read together with Article 4 of the Federal Constitution and relevant case law;

(6) A declaration that the following provisions of Act 155 are unconstitutional:

(a) section 59 which excludes the right to be heard; and

(b) section 59A which excludes judicial review, and

(7) An order of *prohibition* to prevent the respondents from making any subsequent decisions to blacklist the appellant from travelling overseas in similar circumstances.

'Constitutional monetary compensation'

[221] The above would have been sufficient to effectively dispose of this appeal. However, at the hearing of this appeal on 5 August 2020, learned counsel for the appellant further argued that this court should be minded to grant the appellant 'constitutional monetary compensation'. During argument, the Bench queried learned counsel on the point that in the appellant's application for judicial review, she did not pray for damages in

accordance with O 53 r 5 of the ROC 2012. Learned counsel responded that 'constitutional monetary compensation' is different from damages and that the court has the discretion to award it as a form of moulded relief under para 1 in the Schedule to the CJA 1964 and it is covered by the final prayer of the appellant which seeks 'all necessary and consequential relief, directions and orders that this Court think just'. In support, learned counsel for the appellant also referred us a judgment of the Indian Supreme Court in *Nilabati Behera v State of Orissa* 1993 AIR 1960; 1993 SCR (2) 581 ('Nilabati Behera') which was cited with approval by Edgar Joseph Jr FCJ in *Rama Chandran* at p 196.

[222] *Nilabati Behera* concerns a case where the petitioner's son died during police custody. The question before the Supreme Court, engaged as a result of art 32, was essentially whether the petitioner was entitled to monetary compensation. A bench of three judges decided the case. Verma J opined that art 32 was worded as broadly as possible to allow the Indian Courts to remedy a breach of a fundamental right where the ends of justice so required and where no other effective remedy would be forthcoming. At pp 763–764, the learned judge said:

> 20. We respectfully concur with the view that the court is not helpless and the wide powers given to this Court by Article 32, which itself is a fundamental right, imposes a constitutional obligation on this Court to forge such new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the Constitution, which enable the award of monetary compensation in appropriate cases, where that is the only mode of redress available. The power available to this Court under Article 142 is also an enabling provision in this behalf. The contrary view would not merely render the court powerless and the constitutional guarantee a mirage but may, in certain situations, be an incentive to extinguish life, if for the extreme contravention the court is powerless to grant any relief against the state, except by punishment of the wrongdoer for the resulting offence, and recovery of damages under private law, by the ordinary process. If the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law, is to be real, the enforcement of the right in case of every contravention must also be possible in the constitutional scheme, the mode of redress being that which is appropriate in the facts of each case. This remedy in public law has to be more readily available when invoked by the have-nots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies, where more appropriate.

[223] The point to be made is this. Where a breach of a fundamental right is alleged, a cause of action lies. The right itself is grounded on the FC and it does not strictly matter whether the breach could also be made out under private law remedies. The rule is stated with caution as it is not absolute and it depends on the circumstances of the case. As the judgment of Verma J suggests, it is usually open to the poor and unfortunate who cannot otherwise afford private law

litigation. In this context, I accept that we cannot be quick to pigeonhole causes of actions and their ensuing remedies as that would be contrary to the notions of access to justice.

[224] As observed by Verma J, to what extent 'constitutional monetary compensation' is available depends on the facts and circumstances of each case and that the remedy should only be afforded with great judicial restraint. His Lordship suggested that such awards, that is, of constitutional monetary compensation, should only be made 'in appropriate cases where that is the only mode of redress available'. Dr Anand J, explained in his concurring judgment that constitutional monetary compensation is essentially exemplary damages (though again, not damages in the sense of O 53 r 5 of the ROC 2012). This is not inconsistent with the views of Lord Devlin who in *Rookes v Barnard* [1964] AC 1129, said the following at p 227:

> ... three considerations ... should always be borne in mind when awards of exemplary damages are being considered. First, the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. The anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence.
>
> Secondly, the power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty, as in the *Wilkes* case, can also be used against liberty ...
>
> Thirdly, the means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. Everything which aggravates or mitigates the defendant's conduct is relevant.

[225] Of course Lord Devlin spoke in the context of the common law of England but his observations appear to resonate with the views of the Indian Supreme Court in *Nilabati Behera*.

[226] As for us, para 1 of the Schedule to the CJA 1964 provides:

> ADDITIONAL POWERS OF THE HIGH COURT
>
> Prerogative Writs
>
> 1. *Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

[227] It is to be noted that our para 1 is drafted in almost the exact same terms as art 226 of the Indian Constitution whereas art 32 of the Indian Constitution seems slightly more limited in scope though not any less robust.

[228] Article 32(2) of the Indian Constitution, provides:

> (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

[229] Article 226(1) of the Indian Constitution in turn provides:

> (1) Notwithstanding anything in Article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

[230] The words in para 1 of the Schedule to the CJA 1964 are very broad and allow the court to mould remedies either in the form of 'directions', 'orders' or 'writs'. Further, these remedies are not mutually exclusive because they can be fused into a cumulative order or be granted independently of each other but in one order to meet the demands of justice on the facts of each and every case.

[231] In this sense, the jurisprudence of the Indian Courts in respect of arts 32 and 226 of the Indian Constitution is applicable to the context of the para 1 powers and it follows that I endorse the views of Edgar Joseph Jr FCJ in *Rama Chandran* and accept the appellant's submission that the Courts have the power to award constitutional monetary compensation over and above the realm of private law and the specific plea of damages in O 53 r 5 of the ROC 2012. I say this with a caveat that where the case is expressly for damages, it would be more apposite to bring it under O 53 r 5 and that constitutional monetary compensation is reserved only for the most deserving of cases where it stands as the only appropriate remedy. In this, I echo Edgar FCJ's sentiment as follows, at p 197 of *Rama Chandran*:

> Needless to say, if, as appears to be the case, this wider power is enjoyed by our courts, the decision whether to exercise it, and if so, in what manner, are matters which call for the utmost care and circumspection, strict regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors. A flexible test whose content will be governed by all the circumstances of the particular case will have to be applied.

[232] The question now is whether the appellant is entitled to constitutional monetary compensation above and beyond the remedies she has already been afforded. I accept that the conduct of the respondents in this case was calculated for a larger purpose, that is, to prevent her from speaking at a public forum. It has always been open to the authorities to take the appropriate

enforcement measures if they perceive a real criminal threat but instead they chose to impose a travel ban which the law did not otherwise allow them to impose. However, it is my view that, for the following reasons, this is not sufficient to make out a case for constitutional monetary damages.

[233] Firstly, deaths in custody constitute a serious and flagrant violation of the right to 'life' where perhaps any remedy whether in the form of a declaration or a prerogative writ cannot mitigate the loss of life suffered by the detainee. Without confining the remedy to deaths in custody cases, it is my view that the violation in the instant appeal, though serious, does not warrant an award in monetary compensation absent an express plea of damages.

[234] Thus, while I accept learned counsel's submission that the remedy of 'constitutional monetary compensation' fits the bill of 'all necessary and consequential relief, directions and orders that this court think just' as prayed for by the appellant, the facts of this case do not justify the grant of such a remedy, as in my view, the remedies already granted meet the ends of justice.

CONCLUSION

[235] Based on the foregoing, it should be apparent that the decision of the High Court cannot stand as it was decided principally on the decision of *Loh Wai Kong* (FC). The decision of the Court of Appeal also cannot stand for we have already held that the present appeal is not academic. The reasoning in *Sugumar Balakrishnan* (FC) that because art 121(1) had been amended the way it was, the courts must now uphold ouster clauses contained in such federal laws, has been demolished by *Semenyih Jaya* and *Indira Gandhi*. As established earlier, the common ratio of both *Semenyih Jaya* and *Indira Gandhi* is directly applicable to the present case.

[236] Although judicial precedent plays a lesser role in construing the provisions of the FC, I see no reason to depart from the doctrine of *stare decisis*, particularly given the parties' common ground that *Semenyih Jaya* and *Indira Gandhi* correctly held that judicial power is a basic structure of the FC. As Mohd Ghazali FCJ said in *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149:

> [35] I would think that the attitude of this court towards its previous decisions such as *Ultra Badi* and *Vicneswary* upon questions of law should, in my opinion be the same. It is of supreme importance that people may know with certainty what the law is, and this end can only be attained by a loyal adherence to the doctrine of stare decisis. Little respect will be paid to our judgments if we overthrow that one day which we have resolved the day before ...

[237] The appeal is therefore allowed and the orders of the High Court and the Court of Appeal are set aside. The remedies aforementioned are hereby granted. As is standard judicial practice in cases concerning public interest, there shall be no order as to costs.

[238] My learned sister Nallini Pathmanathan FCJ and my learned brother Harmindar Singh Dhaliwal FCJ have read this judgment in draft and have agreed with it.

Nallini Pathmanathan JCA (delivering dissenting judgment of the court):

INTRODUCTION

[239] For the full comprehension of the people of this nation, the net effect of the judgment of the majority of this court is that:

(a) in this day and age, namely the 21st Century, the right to travel outside of Malaysia is not a fundamental liberty under art 5 of the Federal Constitution, even if you have a valid passport — it is only a privilege;

(b) a person can be prohibited from travelling outside of Malaysia by the Director General of Immigration by a law which is merely procedurally correct, without regard to its constitutional validity;

(c) a decision to prohibit any person from travelling outside of Malaysia is imposed at the discretion of the Executive;

(d) that decision of the Executive to prohibit or ban the citizen from travelling outside of Malaysia cannot be judicially scrutinised or reviewed by the superior courts;

(e) the law on which the decision was based is also immune from judicial scrutiny as to its constitutionality, because Parliament is entitled to legislate as it thinks fit;

(f) when any person is prohibited from travelling, he cannot object or be heard on the issue of why the decision to prohibit him from travelling outside of Malaysia is wrong, or why he ought to be allowed to travel; and

(g) as such the superior courts are limited in their powers of review. They may only administratively review statutes and acts or omissions of the Legislature and the Executive, but not constitutionally review the same, if Parliament deems so.

[240] That to my mind, and for the reasons articulated by the Chief Justice of Malaysia, is untenable by reason of art 4(1) of the FC, which enshrines constitutional supremacy and not Parliamentary supremacy.

[241] This appeal concerns questions relating to basic fundamental liberties. I am entirely in agreement with the illuminating and comprehensive judgment of the learned Chief Justice Tun Tengku Maimun bt Tuan Mat. I write this concurring judgment in support, only because I believe that a multiplicity of views on the approaches to be adopted in construing our Federal Constitution enables a better appreciation of its substance and significance.

[242] More specifically, the appeal before us involves questions relating to the rights of a citizen to travel abroad, to freedom of expression and the right to be heard, which are fundamental liberties protected under the Federal Constitution. When such basic rights are affected by executive action, premised on statutory provisions precluding or suspending these rights, the Judiciary is constitutionally empowered, under the doctrine of the separation of powers, and more specifically the Federal Constitution, to review the validity of such acts and provisions.

[243] However, by reason of the Legislature having enacted an ouster clause vide s 59A of the Immigration Acts 1959/63 ('Immigration Acts'), which seeks to prevent or preclude the Judiciary from carrying out its function and exercising its powers of review under the Federal Constitution, the more fundamental issue of the constitutionality of such an ouster clause needs study and analysis, before the questions above can even be considered by the Judiciary.

THE QUESTIONS OF LAW IN THIS APPEAL

[244] The background facts have been set out in the learned Chief Justice's judgment, and I shall not repeat them here.

[245] Neither will I touch on the issue raised by learned senior federal counsel for the Attorney-General's Chambers that this appeal is academic, save to state again that I concur entirely with the conclusion on that issue as adjudicated by the learned Chief Justice.

[246] I shall focus instead on the questions of law posed in this appeal:

> Question 1
>
> Whether section 3(2) of the Immigration Acts 1959/63 empowers the Director General with unfettered discretion to impose a travel ban? In particular, can the Director General impose a travel ban for reasons that impinge on the democratic rights of citizen such as criticizing the Government?
>
> Question 2
>
> Whether section 59 of the Immigration Acts is valid and constitutional?
>
> Question 3

Whether section 59A of the Immigration Acts is valid and constitutional in the light of *Semen yih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 ('Semenyih Jaya') and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 ('Indira Gandhi')?

[247] As stated in the introduction, it is necessary to address question 3 first. This will be followed by questions 1 and finally 2.

THE OUSTER CLAUSE IN S 59A OF THE IMMIGRATION ACTS

[248] Question 3 requires addressing first, because s 59A, which is an ouster clause, when read literally, provides that the courts cannot examine or study the constitutionality of any executive action taken under the Immigration Acts by the Minister or Director General (Director General under s 59B is defined to include all immigration officers discharging or exercising the powers and duties vested in the Director General), save in relation to the limited area of whether there has been procedural compliance with the Acts.

[249] If the section is constitutional, then it means that the courts' powers of judicial review are truncated or abrogated to the extent that it is relegated to reviewing only such procedural matters that may subsist in the Acts.

[250] If the section is unconstitutional because it contravenes any of the articles of the Federal Constitution, then it follows that the powers of the court to exercise its constitutional powers of judicial review are unaffected.

JUDICIAL SUPREMACY

[251] It should be pointed out immediately, as has been done at length and in depth in the judgment of the Chief Justice, that this does not mean that the court supplants the decision or act of the Minister or Director General with its own decision. The courts merely examine the legality of the decision or *acts*, fully aware of the importance of not encroaching upon matters of State or policy, which more properly fall within the purview of the other two arms of government.

[252] The issue of non-justifiability, namely the Judiciary's adherence to the doctrine of the separation of powers and its awareness and acknowledgement that it will decline to enter into such matters, prevent it from making or supplanting executive decisions or hindering legislative measures, save and unless they contravene specific provisions of the Federal Constitution.

[253] For ease of reading I reproduce s 59A of the Immigration Acts:

59A Exclusion of judicial review

(1) There shall be no judicial review in any court of any act done or any decision made by the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, under this Act except in regard to any question relating to compliance with any procedural requirement of this Acts or the regulations governing that act or decision.

(2) In this section 'judicial review' includes proceedings instituted by way of —

(a) an application for any of the prerogative orders of mandamus, prohibition and certiorari;

(b) an application for a declaration or an injunction;

(c) any writ of habeas corpus; or

(d) any other suit or action relating to or arising out of any act done or any decision made in pursuance of any power conferred upon the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, by any provisions of this Acts.

[254] The net effect of this privative or ouster clause is that it seeks to remove the Judiciary's ability to examine or adjudicate upon the legality of both the clause itself as well as the decisions, acts or non-action of the Minister, the Director General as well as all immigration officers discharging or exercising the powers vested in the Director General.

[255] In the context of this appeal, it seeks to prevent the courts from examining the constitutionality as well as the legality of the decision of both the Minister and the Director General to bar or ban a person from travelling abroad, notwithstanding that Maria Chin had, at all material times a valid passport enabling her to so travel.

[256] Although question 3 seeks to question the constitutionality of s 59A in the context of the decisions of this court in *Semenyih Jaya* and *Indra Gandhi* in their exposition on the extent/scope of judicial powers, I propose to first examine the constitutionality of this section in light of art 4(1) of the Federal Constitution

[257] I do so because I am of the considered view that art 4(1) of the FC is the primary article that defines the nature and extent of judicial power. To that extent, art 121(1) of the FC should be read and construed by reference first to art 4(1) of the FC.

[258] This begs the question, why is that so?

THE ROLE OF ART 4(1) OF THE FC

[259] Malaysia is governed by the doctrine of constitutional supremacy, like India, the United States of America, Canada and Ireland, but unlike the United Kingdom where parliamentary supremacy prevails. The erudite comparative analysis undertaken by the Chief Justice reiterates this fundamental principle from a renewed approach, which I respectfully fully endorse.

[260] Article 4(1) of the FC provides as follows:

> 4 Supreme Law of the Federation
>
> This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

[261] It is evident from a perusal of art 4(1) of the FC that it comprises two primary components:

(a) first, it provides for constitutional supremacy; and

(b) second, it provides for all laws which are inconsistent with any provision of the FC to be declared void, but only to the extent of the inconsistency.

[262] The first component, namely constitutional supremacy, has been well articulated, its st arting point being the seminal decision of Suffian LP in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112. It means that the FC takes precedence over all arms of Government, including the Legislature and the Executive. All the arms of Government are governed by the supreme law and must bow to its supremacy. This in turn means that all enacted laws, acts of the executive and decisions of the Judiciary must conform to the confines of the FC, both in form and spirit.

[263] The second component of art 4(1) of the FC gives 'bite' and 'life' to the declared supremacy of the FC. It enforces the supremacy of the FC by allowing for any law which falls outside its purview to be declared void.

[264] Without the second component there is every possibility that the FC would be reduced to a series of theoretical values and ideologies and philosophies, certainly in relation to the enactment of laws by the Legislature and act ions or non-action of the Executive.

[265] What is the effect of the second component? In providing for the declaration of an inconsistent law to be void, it means that *there is an express power of review of such laws provided for in the FC*.

[266] *Who is to exercise such powers? The answer is the Judiciary.* Therefore, art 4(1) of the FC provides expressly for the Judiciary to exercise a power of review in respect of such laws. As it is expressed in the FC, *it is a constitutional power of judicial review.*

[267] It must be emphasised that this is no mere administrative power of judicial review. It is an expressly and definitively specified constitutional power of judicial review. It enables the Judiciary to declare any enacted law as being unconstitutional for inconsistency with the Federal Constitution. As meticulously examined and detailed by the Chief Justice in Her Ladyship's judgment, this does and cannot make the Judiciary supreme. This second component of art 4(1) of the FC is merely the means by which the Federal Constitution is kept supreme. If the Judiciary was not vested with that power, there would be no check or balance available in respect of the Legislature or Executive.

[268] Hence the oft-quoted truth that it is the Judiciary that is the guardian of the Constitution, and the last bastion for the citizens of Malaysia. The Judiciary acts both as sword and shield to ensure that the Federal Constitution as the supreme law is adhered to.

[269] Therefore, in Malaysia under the FC, this power of constitutional judicial review in art 4(1) of the FC is a fundamental or essential feature of the Constitution which cannot be amended, abrogated nor removed by legislation. Put another way, no legislation can override or curtail this constitutionally conferred jurisdiction. Article 4(1) of the FC comprises the lifeblood of the FC as it comprises the entire basis for the operation of the three arms of government, and thereby the democracy that we as a nation ascribe to.

ARTICLE 4(1) OF THE FC AND THE DOCTRINE OF THE SEPARATION OF POWERS AND THE RULE OF LAW

[270] Such a construction is in accord with the doctrine of the separation of powers, which requires the Judiciary to discharge its function of acting as a check and balance on legislative and executive powers. At a macroscopic level it ensures that there is adherence to the Rule of Law. To that extent art 4(1) of the FC enshrines the twin fundamental pillars of a constitutional democracy, namely the rule of law and the doctrine of the separation of powers. It is in this context, that I said earlier that art 4(1) of the FC comprises the root or source for the conferment of judicial power as expounded and articulated further in art 121 of the FC.

ARTICLE 4(1) OF THE FC AND S 59A OF THE IMMIGRATION ACTS

[271] Against this backdrop, the ouster clause that comprises *s 59A of the Immigration Acts clearly runs awry of the express constitutional jurisdiction conferred on the courts to judicially review laws to ascertain their validity in the context of the FC. This is because it seeks to exclude judicial review by the courts altogether, save for procedural matters only, in respect of any Acts or decision of the Minister or Director General under the Immigration Acts.*

[272] Such a statutory provision effectively insulates the acts of persons or bodies acting under the Immigration Acts, from any form of judicial review and any sort of judicial scrutiny, save in respect of procedural matters. These acts are undertaken under the purview of the Immigration Acts. If these decisions and acts cannot be reviewed save for matters of procedure, then the acts of the officials empowered under the Immigration Acts (ie the Minister and the Director General) are rendered immune from art 4(1) of the FC. This in turn effectively seeks to insulate the Act itself from review under art 4(1) of the FC.

[273] Such a provision is not constitutional in that it seeks to preclude the right to challenge legislation which is an integral part of the FC under art 4(1). It is a contravention of art 4(1) of the FC which enables all statutory provisions to be examined in their entirety, for constitutional validity. Article 4(1) of the FC does not envisage its constitutional judicial review function being reduced to merely procedural flaws in the acts and omissions of the state and its officials. It follows that s 59A of the Immigration Acts, being a component part of legislation enacted by Parliament is subject to challenge under art 4(1) of the FC.

[274] Put another way, art 4(1) of the FC prevails over the 'ouster' provision, that is s 59A. Its attempt to preclude a challenge as to the constitutionality of the legislation and the acts and decisions of the persons empowered by the Executive to make these decisions, is ineffective.

[275] Section 59A seeks to encroach upon judicial power expressly and directly as it proscribes judicial scrutiny for inconsistency with the FC. On that score too, it is void for being inconsistent with art 4(1) of the FC. Therefore, on the basis of art 4(1) of the FC alone, s 59A of the the Immigration Acts cannot subsist, and is accordingly void.

JUDICIAL POWER — ARTICLE 121 OF THE FC, *SEMENYIH JAYA* AND *INDIRA GANDHI*

[276] The unconstitutionality of s 59A of the Immigration Acts is further

underscored by the recent Federal Court decisions in *Semenyih Jaya*, *Indira Gandhi* as well as *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 ('Alma Nudo'). These cases all identify judicial review as a constitutional fundamental, that is indispensable. Together with the separation of powers these doctrines give life to the rule of law which comprise the basis for the FC.

[277] In *Semenyih Jaya*, this court speaking through Zainun Ali FCJ, specified that under the doctrine of the separation of powers, it is not permissible for the Legislature to encroach upon the judicial sphere.

[278] Section 59A of the Immigration Acts does encroach upon judicial power expressly and directly, because it precludes judicial scrutiny altogether, which is inconsistent with the express provisions of the FC. Such a statutory provision does injury to the separation of powers doctrine and thereby the rule of law.

[279] In *Indira Gandhi*, Zainun Ali FCJ speaking for this court, emphasised the importance of art 4(1) of the FC by reference, inter alia, to the decision of Chan Sek Keong CJ, the erudite former Chief Justice of Singapore in *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947; [2012] SGHC 163 at paras 14–15 where His Lordship explained the distinction between the United Kingdom's Westminster model which is based on the supremacy of the United Kingdom Parliament and the Singapore Westminster model which is premised (like Malaysia) on the supremacy of the Constitution. The net result as the learned Chief Justice put it is that:

> ... the Singapore courts may declare an Act of the Singapore parliament invalid for inconsistency with the Singapore Constitution and, hence, null and void. Article 4 of the Singapore Constitution expresses this constitutional principle in the following manner:
>
> This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, void.
>
> ... *The specific form of words used in art 4 reinforces the principle that the Singapore parliament may not enact a law, and the Singapore government may not do any act, which is inconsistent with the principle of separation of powers to the extent to which that principle is embodied in the Singapore Constitution.* (Emphasis added.)

[280] As art 4(1) of the FC is identical to, and pre-dates that of the Singapore Constitution, it follows that the construction accorded to that article by the learned then Chief Justice of Singapore accords with the interpretation given to art 4 (1) of the FC in this judgment.

[281] Given the trilogy of judgments of this court referred to above, we should not readily depart from the coherent and rational line of reasoning adopted. I am of the view that this court is bound to abide by the principle establishing that art 4(1) of the FC as expounded in those cases is sacrosanct, and places an express duty on the courts of this land to subject a statute, or executive action, or omission, arising from such statute or statutory provision, to judicial review or scrutiny when challenged, to ensure that it complies with the FC.

[282] It therefore follows that from the perspective of the scope and ambit of *judicial power as entrenched in art 4(1) of the FC, read together with art 121 of the FC, s 59A of the Immigration Acts* is void. It is void because it encroaches on judicial power as exemplified in those two articles of the FC.

THE OPPOSING SUBMISSIONS OF THE ATTORNEY-GENERAL AND THE CONSTRUCTION AND SCOPE OF JUDICIAL POWER UNDER THE FC

[283] Senior Federal Counsel Shamsul Bolhassan and Liew Horng Bin on behalf of the Attorney-General Chambers ('AGC') submitted in essence that on a true construction of art 121 of the FC:

(a) the conferral of the jurisdiction of the courts and powers is by way of federal law and that comprises a basic structure of the Constitution;

(b) the construction of the FC to the effect that the jurisdiction of the courts and its powers being prescribed by federal law 'does not violate the doctrine of separation of powers'; and

(c) limiting the scope and extent of remedies available for the 'enforcement of rights by federal law' does not impinge on judicial power.

[284] In adopting this construction of the jurisdiction and powers of the Judiciary under art 121 of the FC, reliance was placed on the drafting records of the Constitution as well as minutes of specific meetings of members of the Reid Commission.

[285] However, it is significant that the AGC in taking this stance accepted the following propositions relating to judicial power as pronounced in the trilogy of cases comprising *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo* and summarized in *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561 ('JRI Resources'):

(a) judicial power is vested exclusively in the High Courts by virtue of art 121(1). Judicial independence and the separation of powers are recognized as features in the basic structure of the FC. The inherent

judicial power of the civil courts under art 121(1) is inextricably intertwined with their constitutional role as a check and balance mechanism;

(b) Parliament does not have the power to amend the FC to the effect of undermining the doctrine of separation of powers and the independence of the Judiciary which formed the 'basic structure' of the FC (see paras 74–44 of *Semenyih*; features of the basic structure cannot be abrogated or removed by a constitutional amendment (*Indira Gandhi* at para 39);

(c) the courts can prevent Parliament from destroying the 'basic structure' of the FC. And while the FC does not specifically explicate the doctrine of basic structure, what the doctrine signifies is that a parliamentary enactment is open to scrutiny not only for clear-cut violation of the FC but also for violation of the doctrines or principles that consti tute the constitutional foundation (see para 73 of *Alma Nudo*);

(d) a Constitution must be interpreted in light of its historical and philosophical context, as well as its fundamental underlying principles; the foundational principles of a constitution shape its basic structure (*Indira Gandhi* at paras 29–30);

(e) judicial power cannot be removed from the Judiciary; judicial power cannot be conferred upon any other body which does not comply with the constitutional safeguards to ensure its independence; non-judicial power cannot be conferred by another branch of government onto the judiciary (*Semenyih Jaya* at paras 54, 86 and 105; *JRI Resources* at para 17); and

(f) the power of Parliament to make laws with respect to matters enumerated in the Federal or Concurrent Lists of the FC is not to be read as carte blanche for Parliament to make law contrary to the doctrine of separation of powers or the exclusive vesting of judicial power under art 121 (see para 19 of *JRI Resources*).

[286] This summarisation by the AGC of the principles to be gleaned from recent case-law is accurate, and cements the independence of the Judiciary as a check and balance on the Legislative and Executive arms. Their submissions also accept that judicial power cannot be removed nor transgressed.

THE AGC'S ARGUMENTS SUPPORTING THE PROPOSITION THAT S 59A OF THE IMMIGRATION ACT IS VALID AND CONSTITUTIONAL

[287] The thrust of the argument for the AGC was that s 59A is both valid and constitutional because:

(a) *Semenyih Jaya* held that the 1988 Constitutional Amendment vide s 8 of

the Constitution (Amendment) Act 1988 ('Act A704') which removed the vesting of judicial power of the Federation in the Judiciary had impinged on the separation of powers and the independence of the Judiciary, both of which are basic structure components of the Judiciary;

(b) the present appeal does not involve the removal of judicial power; nor does it deal with a finality clause; and

(c) the true purport of question 3 is whether the remedy in the form of judicial review could be limited by an Acts of Parliament in its scope by confining the challenge to procedural compliance of an impugned decision. Alternatively, whether it is a basic structure of the FC that an aggrieved person is entitled to 'the fullest form of remedy' in challenging a public authority's decision. This in turn it is submitted calls into question whether it is a basic structure of the FC that courts enjoy unlimited jurisdiction and unbri dled powers when it comes to enforcement of rights by way of judicial review.

[288] The stance then taken was that in order to answer these questions it is necessary to study the historical records of the FC.

MY ANALYSIS

Issue (a) of the AGC's submissions: The proposition that Semenyih Jaya held that the 1988 Constitutional Amendment impinged on the separation of powers and the independence of the Judiciary, both of which are basic structure components of the Judiciary

[289] In submitting that this court held that the 1988 constitutional amendment had removed the vesting of judicial power in the Judiciary and impinged on the doctrine of the separation of powers and the independence of the Judiciary, both comprising a basic structure of the FC, the learned SFCs made reference *to paras 74–78 of the judgment in Semenyih Jaya. The thrust of the submission appears to suggest that this court accepted that the amendment had the stated effect. However, this is not the case.*

[290] In point of fact, a further and fuller reading of *Semenyih Jaya* discloses that from paras 60–91, the Federal Court explained the source and amplitude of the judicial powers of the Judiciary. It is evident from these paragraphs that the powers of the Judiciary are not circumscribed nor limited to that determined by federal law and thus the Legislature, namely Parliament. That would clearly be in contravention of the doctrine of separation of powers.

[291] *And from paras 76–91 of the judgment the Federal Court goes on to explain in depth how and w hy the powers of the Judiciary remain intact notwithstanding*

the 1988 amendment. The contention that the 1988 amendment had the effect of removing judicial powers was soundly rejected.

[292] It is therefore not accurate for the AGC to suggest in its submissions that from a reading of paras 74–77 *in vacuo*, the Federal Court somehow accepted in those few paragraphs that the powers of the Judiciary were effectively diminished, removed or abrogated by such amendment.

[293] In this context, it is necessary to reiterate that the majority reasoning of the Federal Court in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1 as extolled by the then President of the Court of Appeal Abdul Hamid, was departed from in *Sivarasa Rasiah*, *Semenyih Jaya* and *Indira Gandhi* and *Alma Nudo*.

The effect of Public Prosecutor v Kok Wah Kuan and the subsequent trilogy of cases in Semenyih Jaya and Indira Gandhi and Alma Nudo

[294] At pp 14–15 of the decision of this court in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1 ('Kok Wah Kuan'), Abdul Hamid Mohamad PCA (later CJ) stated that:

> There was thus a definitive declaration that the judicial power of the Federation shall be vested in the two High Courts. So, if a question is asked 'was the judicial power of the Federation vested in the two High Courts? ' The answer has to be 'yes' because that was what the Constitution provided. Whatever the words 'judicial power' mean is a matter of interpretation. Having made the declaration in general terms, the provision went on to say 'and the High Courts ... shall have jurisdiction and powers as may be conferred by or under federal law '. In other words, if we want to know what are the specific jurisdiction and powers of the two High Courts, we will have to look at the federal law.
>
> After the amendment, there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts. What it means is that there is no longer a declaration that 'judicial power of the Federation' as the term was understood prior to the amendment vests in the two High Courts. *If we want to know the jurisdiction and powers of the two High Courts we will have to look at the federal law. If we want to call those powers 'judicial powers', we are perfectly entitled to. But, to what extent such 'judicial powers' are vested in the two High Courts depend on what federal law provides, not on the interpretation the term 'judicial power' as prior to the amendment. That is the difference and that is the effect of the amendment. Thus, to say that the amendment has no effect does not make sense. There must be. The only question is to what extent?* (Emphasis added.)

[295] The net effect of what was said by the Abdul Hamid PCA (as he then was) amounts, with the greatest respect, to a literal reading of the 1988 amendment to art 121 of the FC. It meant that the jurisdiction and powers of the court were to be determined by federal law. The net effect of such a literal

and cursory reading is that the amendment had the effect of transferring the powers of the Judiciary to the Legislature, ie Parliament. A

[296] Such a construction can only be arrived at by a reading of art 121 of the FC in isolation or *in vacuo*. There was no attempt to read the 1988 amendment in the context of, or harmoniously with the rest of the FC, particularly the foundational articles which determine how this State operates as a functioning democracy, practicing the doctrine of the separati on of powers under a Federal Constitution, which is supreme. B

[297] *In this context it ought to be borne in mind that w ords should yield to principles and the doctrines underpinning the structure of the FC. As judges we are not mere 'grammarians', reading the Constitution literally.* C

[298] As stated by Richard Malanjum CJSS (later CJ) in his strong dissenting judgment (in relation to the derogation of judicial power) in *Kok Wah Kuan*, judicial powers, more particularly its inherent powers could not be eradicated or made subordinate to Parliament such as to render the Judiciary a mere agent of Parliament. Again, His Lordship stated that this would run awry of the doctrine of the separation of powers and the rule of law. D E

[299] The dissenting views expressed by Richard Malanjum CJSS in *Kok Wah Kuan* were adopted and expanded in the trilogy of cases cited above, namely *Semenyih Jaya*, *Indira Gandhi* and more recently in *Alma Nudo*. These cases represent the views of this court post-the majority decision in *Kok Wah Kuan*. F

[300] The now prevailing and accepted position in law in relation to judicial powers is correctly represented by this court in:

(a) the dissenting judgment of Richard Malanjum FCJ (later CJ) in *Kok Wah Kuan*; G

(b) the trilogy of cases above, namely *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo*, which held that the amendment cannot be read as literally as was done by the majority in *Kok Wah Kuan* because it would undermine the doctrine of the separation of powers; H

(c) more significantly the doctrine of constitutional supremacy which is the core feature on which the FC is premised; and

(d) the net effect of a literal reading as espoused by the majority in *Kok Wah Kuan*, would be to place the Judiciary in a position subordinate t o that of Parliament, which is untenable and simply wrong, in a democracy that is based on a written Constitution which declares constitutional supremacy. I

Article 4(1) must be read together with art 121(1) to comprehend the jurisdiction and powers of the Judiciary under the FC

[301] In the analysis of the scope of the jurisdiction and powers of the superior courts of the nation, there has been considerable attention placed on the effect of the amending words resulting in the present form of art 121(1) of the FC. This has been the case in scholarly articles and case-law, where, in construing whether and how the powers of the courts have been affected, the focal point of concentration has been a comparison of the pre and post amendment articles.

[302] *As I have stated earlier it is my considered view that in construing whether the 1988 amendment had the effect of diminishing or abrogating or altering the inherent jurisdiction of the courts and judicial power there by, the starting point must be art 4(1) of the FC.*

[303] The legal rationale for this lies in the scope and ambit of art 4(1) of the FC. It is in Part I of the FC and described as the law of the Federation. In its singular form it stipulates that the FC is the supreme law, thereby defining and indubitably guaranteeing constitutional supremacy as the law of the land. The shoulder note further validates constitutional supremacy, by stipulating once again that the FC is the supreme law.

[304] However, that is not all. To give effect to constitutional supremacy, the second component of art 4(1) of the FC allows the striking down of any law that is inconsistent with the FC, and which is then void. The words in art 4(1) of the FC therefore expressly provide for *constitutional judicial review*, as the ability to declare that a law is void for falling outside the purview of the FC, entails and requires the exercise of the power of review. That power lies solely and indubitably with the Judiciary.

[305] The entirety of art 4(1) of the FC therefore holds within it, and encompasses the twin doctrines of constitutional supremacy as well as the separation of powers. This in turn adheres to the Rule of Law, a foundational tenet of the FC.

[306] It is for this reason that any discursive and rational construction of the scope and ambit of judicial power as expressed in art 121 of the FC must commence with art 4(1) of the FC, as its basis.

The net result of construing arts 121 and 4 of the FC literally and separately

[307] Article 121(1) of the FC must therefore be construed harmoniously with art 4(1) of the FC. The two provisions cannot be construed so as to give rise to a significant and fundamental difference relating to the jurisdiction and

ambit of judicial power. The see ming anomaly that arises if a literal reading of the express words of these two articles is undertaken, is this.

[308] Article 4(1) of the FC contains, as stated earlier, an express provision of judicial review because it allows any law that is inconsistent with the FC to be declared void. This is a constitutionally embedded power of judicial review.

[309] If, however, art 121(1) of the FC is accorded the literal meaning as ascribed to in the majority decision in *Kok Wah Kuan*, then it would follow that the all powers of the Judiciary fall under or are determined by Parliament. *How then can the Judiciary continue to strike out legislation passed by Parliament, if its powers are to be determined and circumscribed by Parliament in the first place?*

[310] *The net result would be that art 4(1) of the FC and art 121(1) of the FC would be at odds. The latter, providing that judicial powers are relegated to those under federal law, while art 4(1) of the FC allows the Judiciary to strike down that very same federal law.* Clearly any such reading is flawed and untenable.

Construing arts 4(1) and 121 of the FC harmoniously

[311] It is only if art 121(1) of the FC is read together with art 4(1) of the FC that any rational construction of judicial power under the FC can be arrived at. A harmonious construction of judicial power as contained in these two articles would also have the desirable result of ensuring that the doctrines of constitutional supremacy and separation of powers remain as foundational features of judicial power. This is in keeping with the Rule of Law.

[312] Therefore in construing art 121(1) of the FC in relation to the phrase '... shall have jurisdiction and powers as may be conferred by or under federal law' the only harmonious meaning that can be accorded to those words is that *the specification, description and arrangement of the powers of the courts is to be enacted by Parliament.*

[313] Any such description or listing or setting out of the powers of the various courts in the hierarchy of the judicial arm of government by Parliament cannot, however, derogate in any manner from the powers of the courts to act as a check and balance vis a vis the Executive and the Legislature, as expressly decreed in art 4(1) of the FC.

[314] The function of the Legislature is to legislate in respect of the administration of justice but not, in any manner, to encroach upon the independence of the Judiciary by derogating from its powers under the FC. In this context, I respectfully concur with the Chief Justice that the abrogation of constitutional remedies effectively amounts to an abrogation of judicial power.

[315] Another reason why the FC in relation to judicial power ought to be construed as I have argued, is that our system of government is premised on a constitutional democracy, which stipulates that the three arms of government, namely the Legislature, Judiciary and Executive are co-equal. If the construction adopted by the majority in *Kok Wah Kuan* (and other case-law ascribing to the construction taken there) is adopted, this would amount to taking away the co-equal foundational basis of the Constitution and government in the nation. That is wholly repugnant and untenable.

[316] Article 4(1) of the FC comprises a fundamental foundational feature or structure of the FC. Whether it is called the basic structure doctrine or an essential feature or foundational feature matters not. To quote: 'What's in a name? That which we call a rose by any other name would smell as sweet'. Any attempt to derogate from the lifeblood or élan vital, ie art 4(1) of the FC, must fail.

[317] Therefore, when the FC is construed holistically whereby art 121(1) of the FC is read together with art 4(1) of the FC, it follows that the powers of the Judiciary were never abrogated or removed or diminished by the 1988 amendment. That this is so is evident from the continued existence and application of *art 4(1) of the FC, both before and after the coming into force of the amendment to art 121 FC.* The courts continued to exercise their power to strike down of the federal law where it was inconsistent with the FC.

Meaning of 'Law' in arts 121(1) and 4 of the FC

[318] A second line of reasoning that supports such a harmonious construction is that 'law' or 'federal law' as enunciated in art 121 of the FC must have the same meaning as 'law' in art 4(1) of theFC. If not so, and the word 'law' in both articles carried different meanings, there would be confusion and the FC would be anomalous, unpredictable and unreliable. Such a jarring construction is again unsound.

[319] And 'law' in art 4(1) of the FC must refer to 'law' that is valid under the FC. It follows that 'law' under art 121 of the FC must also be law that is valid under the FC. That in turn means that any 'federal law' as stated in art 121 of theFC can be constitutionally challenged under art 4(1) of theFC. And again, only the courts can ascertain this issue. In exercising this constitutional duty, the courts are bound to only enforce, recognise and give effect to law that is constitutionally valid. So, the suggestion that the courts' powers are circumscribed by federal law is absurd.

[320] It follows that Parliament cannot enact any law and expect the courts to exercise their judicial power in accordance with such law, no matter its content

and no matter whether it conforms to the FC or not. The courts can only act in accordance with constitutionally valid federal law, where the role of ascertaining constitutional validity falls on them.

[321] *So in answer to the question whether the jurisdiction and power of the High Court was curtailed by the 1988 amendment, it follows that the answer is that it did not.*

[322] *Did the Legislature remove any part of the judicial power of the High Court by virt ue of its amendment more specifically '… and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law'?*

[323] *Again for the reasons cited above the answer must be that it did not and could not. The primary reason remains the entrenched substantive right of review in art 4(1) of the FC which serves to ensure that the Constitution remains supreme.*

[324] Even if it is supposed for a minute that the correct construction is that judicial power was abrogated, again the answer lies in art 4(1) of the FC, because any amendment that sought to derogate such power would run foul of the said article.

[325] Again it is emphasised that the constitutional powe r of review subsists to protect the supremacy of the Constitution, not to allow for judicial supremacy. To that extent, it is a fundamental feature or part of the basic structure of the FC and cannot be so amended. As such, judicial power can never be 'unbridled' or 'limitless' as seems to be suggested by the AGC. The jurisdiction and powers of the Judiciary are circumscribed by the FC.

[326] *If the 1988 constitutional amendment is construed as having the effect of abrogating or diminishing or removing the constitutional power of review, which subsists to ensure the supremacy of the Constitution, it is void, as art 4(1) of the FC comprises a part of the basic structure of the Constitution.*

[327] Consider the FC without art 4(1) of the FC. The nation would be left with a rudderless document. The FC would no longer be supreme and there would be no check and balance on either the Legislature or the Executive. I concur with the Chief Justice that any other construction would result in Parliamentary supremacy. And that is why any construction seeking to remove or derogate from the constitutionally guaranteed power of review is deeply flawed.

The trilogy of cases — *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo*

[328] The importance of art 4(1) of the FC has been strongly emphasised in the trilogy of cases above. They have all identified the Judiciary's review function as a constitutional imperative underpinning the rule of law and separation of powers as the foundation of the Constitution. These concepts were recognised as comprising the basic structure of the Constitution. Being sacrosanct and inviolate, they are not amenable to any attempt to abrogate the structure whether by way of a constitutional amendment or otherwise.

[329] The insightful statements of Zainun Ali in *Semenyih Jaya* warrant repetition:

> ... The important concepts of judicial power, judicial independence and the separation of powers are as critical as they are sacrosanct in our constitutional framework.
>
> ...
>
> The concepts above have been juxtaposed time and again in our judicial determination of issues in judicial reviews. Thus an effective check and balance mechanism is in place to ensure that the Executive and the Legislature act within their constitutional limits and that they uphold the rule of law ... the powers of the executive and the Legislature are limited by the Constitution and that the Judiciary acts as a bulwark of the Constitution in ensuring that the powers of the executive and Legislature are to be kept within their intended limit ...

[330] And again in both *Semenyih Jaya* and *Indira Gandhi*, the importance of judicial review as a critical expression of the FC's basic structure which encapsulates the rule of law and separation of powers was emphasised:

> ... the power of judicial review is essential to the constitutional role of the court, and inherent in the basic structure of the Constitution ... This power of judicial review is of paramount importance in a Federal Constitution. Indeed it has been said that the heart and core of a democracy lies in the judicial process ...

[331] And in *Alma Nudo* a nine-man bench of this court held as follows:

> ... The court has, on several occasions, recognised that the principle of separation of powers, and the power of the ordinary courts to review the legality of state action, are sacrosanct and form part of the basic structure of the FC (see *Semenyih Jaya*, *Indira Gandhi*) ...
>
> ... The role of the judiciary is intrinsic to this constitutional order. Whether an enacted law is constitutionally valid is always for the courts to adjudicate and not for Parliament to decide ...

[332] And as long ago as *Lim Kit Siang v Dato Seri Dr Mahathir Mohamad* [1987] 1 MLJ 383 Salleh Abbas Lord President held:

> ... The courts have a constitutional function to perform and they are the guardians of the constitution within the term and structure of the constitution itself; *they do*

not only have the power of construction and interpretation of legislation but also the power of judicial review — a concept that pumps through the arteries of every constitutional adjudication … and in performing their constitutional role they must of necessity and strictly in accordance with the constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action. (Emphasis added.)

[333] The role of the Judiciary as the gate-keeper of the FC is indisputable, and any attempt to alter that by shifting the balance of power to Parliament would defeat the basis for the existence of the FC as promulgated and the system of democracy that comprises the basis for government in the state.

[334] When the Judiciary ceases or fails to discharge its duty under art 4(1) of the FC of reviewing statutes, and executive action or omission, for conformity with the FC, then that vital element of judicial independence is placed in peril at best, or lost, at worst. Without judicial independence, the conferment of powers under the FC, consonant with the doctrine of the separation of powers and the rule of law, will be rendered obsolete. The practical result would be a shift from constitutional supremacy to parliamentary sovereignty, which undermines the foundational principles on which this State was formed.

Other jurisdictions with written Constitutions

[335] A similar pattern is noted in other countries with written constitutions premised on the doctrines of the separation of powers and the rule of law. In *Indira Nehru Gandhi v Raj Narain* AIR 1975 SC 2299 the Indian Supreme Court discussed the sanctity of the doctrine of separation of powers and the exclusivity of judicial power. It held, inter alia, that:

… *A declaration that an order made by a court of law is void is normally part of the judicial function and is not a legislative function* … by and large the spheres of judicial function and legislative function have been demarcated and it is not permissible for the Legislature to encroach upon the judicial sphere … It is not permissible to the Legislature to declare the judgment of the court to be void or not binding. (Emphasis added.)

(See also *Liyanage v R* [1967] 1 AC 259.)

[336] In *Minerva Mills Ltd & Ors v Union of India & Ors* 1980 AIR 1789, the Indian Supreme Court described the function of the Judiciary to review as an integral part of their constitutional system and stated that:

… *it cannot be abrogated without affecting the basic structure of the Constitution.*

…

… (if) the power of judicial review is taken away and it is provided that the validity of any law made by the Legislature shall not be liable to be called in question on any

A ground, even if it is outside the legislative competence of the Legislature or is violative of any fundamental rights ... it would make a mockery of the distribution of legislative powers between the Union and the States and render the fundamental rights meaningless and futile ...

B **[337]** As referred to by the Chief Justice, one cannot speak of judicial power and the role of the Judiciary to review legislation for consistency with the Constitution, and ignore the significance of *Marbury v Madison* 1803 1 Cranch 137; 1803 5 US 137. Justice John Marshall outlined the duty of the Judiciary in no uncertain terms:

C It is emphatically the province and duty of the Judicial Department to say what the law is.

[338] He went on to point out that the powers enjoyed by the branches of the D government are limited by the Constitution and such limitation must be subjected to the scrutiny of the courts. *That power is the power of constitutional judicial review. Without it, the constitutional imitations imposed on the other branches would be futile and meaningless*.

E **[339]** Despite these clear statements of the law both within and outside our jurisdiction, should the courts continue to comply with ouster clauses such as s 59A of the Immigration Act, that would amount to a violation or a failure to exercise their inheren t judicial power as encapsulated under art 4(1) of the FC, F which comprises the foundation of the FC. To borrow from Chief Justice Marshall's quote in *Marbury* that would mean that the '... Courts must close their eyes on the Constitution and see only the law ...'.

Section 59A of the Immigration Acts

G **[340]** What is the effect of s 59A of the Immigration Acts? It seeks to insulate judicial review in any court of any act done or any decision made by the Minister or the Director General (and in East Malaysia the State Authority) save for any question relating to compliance with procedural requirements.

H **[341]** When applied to the current factual matrix, it has the following effect and consequences:

(a) a decision was made by the Minister or Director General that persons I who 'memburukkan nama Kerajaan' or persons who tarnish or criticize the government would be blacklisted in terms of travel abroad;

(b) a circular was issued by the Director General purportedly pursuant to his powers under s 3(2) of the Immigration Acts. The circular presumably was to be utilised against such persons as described above, in the disc

retion of the Minister, Director General or any immigration officer vested with the powers to carry out the duties of the Directo General (see s 59B);

(c) in the instant appeal Maria Chin was supposed to travel to Gwangju, South Korea to accept an award and participate or speak at a human rights conference held in conjunction with the awards ceremony from 15 May 2016 until 18 May 2016;

(d) on the day scheduled for her departure, and mere minutes prior to boarding her flight, she was infor med that she was 'blacklisted' and could not travel abroad, far less to South Korea;

(e) this was despite the fact that she had a validly issued passport which gave her the right to travel;

(f) Maria Chin was not given any reasons for the decision to blacklist her either on that date or subsequently;

(g) she was not accorded an opportunity to be heard either on the date of departure nor subsequently; and

(h) Maria Chin was therefore constrained to file an application for judicial review to the courts to comprehend and challenge the decision to deprive her of her right of travel.

[342] An application of s 59A in the judicial review application means that neither the Minister nor the Director General need respond to Maria Chin's challenge as to why she was:

(a) precluded from travelling on that day, which impinges on her right to travel, particularly in view of the valid passport in her possession; and

(b) precluded from exercising her right to freedom of expression under art 10 of the FC as she could neither speak at the awards ceremony nor at the human rights conference in relation to Bersih 2.0.

[343] It is evident from the foregoing that any attempt to procure an explanation, reasons, justification for the decision of the Minister and/or the Director General would be met with the blanket immunity afforded by s 59A of the Immigration Acts. The section precludes judicial review of the decision that affected Maria Chin so gravely, save for procedural compliance.

[344] The exclusion of judicial review in relation to the substantive grounds or reasons for preventing Maria Chin from travelling clearly contravenes art 4(1) of the FC. Section 59A precludes the constitutional right of judicial review of the Immigration Acts, more particularly the Minister or Director General's decision made pursuant to the Acts, save for procedural compliance.

Procedural compliance has no meaning in the present context.

[345] As it currently subsists, s 59A derogates from the court's jurisdiction and judicial power to review the basis for the Minister or Director General's decision. By attempting to do that, s 59A contravenes art 4(1) of the FC which decrees a substantive right of review of all legislation to ensure compliance with the Constitution.

[346] In other words, if the courts are precluded from even examining the validity of the action of the Minister or Director General made pursuant to or under the Act, how can the court's function of review under art 4(1) of the FC be discharged?

[347] It follows that as s 59A of the Immigration Acts contravenes art 4(1) of the FC, it is inconsistent with a primary article of the FC and is void. It falls outside the purview of the FC and is to that extent void.

[348] *For these reasons, I therefore conclude that s 59A of the Immigration Act, being inconsistent with the FC, is void.*

Consequence of declaring s 59A of the Immigration Acts void

[349] What is the consequence of s 59A of the Immigration Acts having been declared void? It is simply that the courts are enabled to discharge their constitutional duty of review under art 4(1) of the FC. The courts can no longer be limited to exercising their powers of judicial review on procedural grounds alone.

[350] Practically speaking, it means that the Minister or Director General should provide justification for the decision taken to prohibit Maria Chin's right to travel abroad and participate in the awards ceremony including the human rights conference. This normally takes the form of an affidavit. It will then be incumbent upon the court to determine whether the decision was valid or erroneous premised on established principles of law relating to judicial review (see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374). It has no greater significance than that.

Issue (b): The present appeal does not involve the removal of judicial power; nor does it deal with a finality clause

[351] For the reasons I have set out fully in response to the first proposition of law put forward by the AGC in issue (a), I have explained that contrary to the submission made, this appeal does indeed deal with the removal of, or derogation of judicial power.

[352] That takes its form in s 59A of the Immigration Ac ts which seeks to preclude the courts from exercising their inherent and fundamental rights of judicial review as expressly provided for in art 4(1) of the FC. The restriction of the right of judicial review such that it is limited to a review of solely procedural matters is a clear attempt to impinge upon, diminish or remove judicial powers.

[353] To put matters further in perspective, s 59A of the Immigration Acts is an ouster clause. Ouster clauses by their very nature seek to deprive or remove the powers of the court from exercising the right of judicial review. An inability to examine a decision, save in respect of procedural irregularities restricts the powers of judicial review conferred on the Judiciary. Under the FC, the Judiciary has been conferred with the constitutional power of judicial review. Therefore, this is also a misconceived submis sion. The issue brings to the fore the jurisdiction and fundamental powers of the Judiciary as provided under the FC as well as federal law.

Issue (c): Whether it is a basic structure of the FC that an aggrieved person is entitled to 'the fullest form of remedy' in challenging a public authority's decision. This in turn it is submitted calls into question whether it is a basic structure of the FC that courts enjoy unlimited jurisdiction and unbridled powers when it comes to enforcement of rights by way of judicial review

[354] By posing the question in the aforesaid form, the learned two senior federal counsel submitting for the AGC seek to deflect from the central thrust of the issue before the court, which is the constitutional validity of s 59A as a whole. Focus is placed, and emphasis given to remedies rather than the fundamental importance of judicial review.

[355] It is further supposed that the right of an aggrieved person to remedies under the FC is not absolute, and that the Legislature is entitled to limit remedies when a decision of a public authority is challenged. To allow an aggrieved person the full scope of remedies, it is suggested by the AGC, would amount to according the courts 'unlimited jurisdiction' and 'unbridled powers' when it comes to the enforcement of rights by way of judicial review. Such jurisdiction and powers do not comprise a basic structure of the FC. To support these contentions, the AGC turns to the historical records preceding the drafting of the fundamental articles of the FC relating to judicial power and more particularly art 4(1) of the FC.

Is judicial review a remedy or is it an entitlement under the FC?

[356] The first point to be made is that judicial review is not merely a remedy but is a fundamental right entrenched within the FC. As I have explained at length earlier on in this judgment, art 4(1) FC contains (in its second

component) the substantive constitutional right of review. It has also been explained that such a substantive constitutional right of review can only be undertaken by the judicial arm. Neither the Legislature nor the Executive can undertake this function.

[357] *It is therefore of utmost importance to comprehend that the right of judicial review under our FC is a constitutional right and not a mere administrative remedy conferred upon the Judiciary by the Legislature. It has earlier been explained that this constitutional right of review is consonant with the doctrine of constitutional supremacy, because the only way in which the supremacy of the FC can be maintained, is if laws enacted by the Legislature and executed by the Executive, can be reviewed in order to ensure its adherence with the provisions of the FC. And as stated by the learned Chief Justice in her judgment, as art 4(1) is not self-executing, such review is undertaken by the Judiciary.*

[358] *I have also explained that in discharging such a function, the Judiciary is not and cannot become 'supreme' as it w ere, because the Judiciary is subject to the FC in as much as are the other arms of government. The doctrine of the separation of powers come s into play to ensure that the Judiciary does not encroach upon the functions and duties of the other co-equal arms.*

[359] As such, recourse to the Courts of Judicature Act 1964 ('the CJA') and the powers and jurisdiction accorded to the courts, for example the powers expounded under Schedule 1 to s 25 of the CJA as remedies in the form of the prerogative writs, for example, do not define the ambit of the court's powers of review. They delineate and describe the remedies that a court may mould when, and after, exercising its constitutional right of review conferred upon it under art 4(1) of the FC, to enable the doctrine of constitutional supremacy to be protected.

[360] Therefore, the submissions put forward by learned SFC on behalf of the AGC are not tenable for the following reasons:

(a) an aggrieved person, when he succeeds in challenging a decision of a public authority, is entitled to the fullest form of remedy that the courts ca n fashion or mould, but at all times within the purview of the FC (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145);

(b) the courts do not enjoy an 'unlimited jurisdiction' nor 'unbridled powers' when it comes to enforcement of rights by way of judicial review, because the courts are subject to the FC itself, as well as the doctrine of separation of powers as has been explained. However, this does not enable the Legislature to encroach onto, or regulate and limit judicial power by passing legislation which precludes the courts from

discharging its constitutional function of review as comprised in art 4(1) of the FC;

(c) the enforcement of rights by way of judicial review does comprise a part of the basic structure of the FC under art 4(1) of the FC; and

(d) to that end it is not open to the Legislature or the Executive to try and stultify, derogate, abrogate or denude the Judiciary of its powers of review, because that would contravene art 4(1) of the FC which provides a constitutional right of review. To that extent s 59A is void, as explained earlier.

The historical records relating to the Federal Constitution

[361] I first state, with respect, that I concur fully with the Chief Justice's judgment in relation to the construction placed by the AGC in relation to judicial power under the FC as it obtains from the historical records. I also concur with the Chief Justice's examination of the history of constitutional theory of the United Kingdom, the United States and India.

[362] It is postulated for the AGC that the historical records leading up to the Federal Constitution were not available for consideration in this court in the cases of *Indira Gandhi* or *Semenyih Jaya*, and to that extent a lacuna subsists in the reasoning of those cases.

[363] That again is a misconceived submission for the following reasons: A perusal and analysis of the Reid Commission Report derogates from any suggestion that judicial powers were intended to be 'subject' to federal law. Again, this is for the simple reason that the FC subscribes to the twin pillars of:

(a) constitutional supremacy; and

(b) doctrine of the separation of powers.

[364] As the doctrine of the separation of powers operates on the basis of the co-equality of the three arms of government it is not possible or permissible for any one branch like the Legislature to have greater powers or to be dominant over the Judiciary. That undermines the basis of the doctrine.

[365] Perhaps more significantly, given that the nation is governed by the doctrine of constitutional supremacy any attempt to clothe the Legislature with powers superior to that of the Judiciary would undermine the doctrine.

[366] If the Legislature, is indeed accorded more dominant, or superior powers than the Judiciary, including powers over the Judiciary, it will be open

to it to enact laws which preclude review, yet fall outside the purview of the FC. This would give rise to two consequences:

(a) the destruction of constitutional supremacy; and

(b) no check and balance against the Legislature and the Executive.

[367] That would undermine the system of government provided for in our Federal Constitution. Under no circumstances can it be said that the Reid Commission or the historical records subscribed to any such devolution of power between the three arms of government.

[368] A perusal of the Reid Commission Report is warranted in these circumstances. In relation to the Judiciary, this is what was said and determined:

> CHAPTER VI — THE JUDICIARY
>
> 122. *As the law now stands, the establishment, jurisdiction, powers, fees and expenses of all Courts, excluding Muslim Courts, are within the legislative powers of the Federation. This provision must be read, however, subject to the express terms of the Federation Agreement, which provide for a Supreme Court consisting of a High Court and a Court of Appeal* ... (Emphasis added.)

[369] The Supreme Court, High Court and Court of Appeal however comprised the superior judiciary which did not fall 'within' the legislative powers of the Federation. It was independent of the same. The report continued as follows:

> ... 123. We recommend *the continuance of the present Supreme Court, which will retain its present powers and procedure. Its jurisdiction will, however, be considerably enlarged*. First, we consider that the *function of interpreting the Constitution should be vested not in an ad hoc Interpretation Tribunal, as provided by the Federation Agreement, but (as in other federations) in the ordinary courts in general and the Supreme Court in particular*. The States cannot maintain their measure of autonomy unless they are enabled to challenge in the Courts as ultra vires both Federal legislation and Federal executive acts. *Secondly, the insertion of Fundamental liberties in the draft Constitution requires the establishment of a legal procedure by which breaches of those Fundamental Liberties can be challenged.*
>
> Thirdly, it seems desirable that a method of securing a rapid decision on a constitutional question should be provided, and accordingly we have in Article 121 made provision for reference to the Supreme Court on the lines adopted in Canada, India and Pakistan ... (Emphasis added.)

[370] It is apparent that the Supreme Court, comprising also the High Court and Court of Appeal were excluded from tribunals or 'courts' falling under legislative power. The Supreme Court comprised the third arm, namely the independent judiciary, carrying with it inherent jurisdiction to correct and

review the decisions of inferior tribunals. That inherent power continued to vest in the Judiciary under the FC in its original form in 1957 and subsequently 1963. To that extent it is inaccurate to suggest that the Supreme Court fell within or under legislative power.

[371] The fact that its jurisdiction was delineated and described in statutes such as the CJA etc, in no way detracted from the fact that th ere was always an independent Judiciary in place prior to the FC, which was considerably strengthened in the FC. It was the intent of our forefathers that a key feature of the Supreme Court was the retention of all requisite aspects of an independent judicial arm to act as a check and balance against any possible legislative or executive incursions. This is borne out by a reading of that portion of the Report relating to fundamental rights.

> CHAPTER IX — FUNDAMENTAL RIGHTS
>
> Constitutional Guarantees
>
> 161. *A Federal constitution defines and guarantees the rights of the Federation and the States: it is usual and in our opinion right that it should also define and guarantee certain fundamental individual rights which are generally regarded as essential conditions for a free and democratic way of life*. The rights which we recommend should be defined and guaranteed are all firmly established now throughout Malaya and it may seem unnecessary to give them special protection in the Constitution. But we have found in certain quarters vague apprehensions about the future. We believe such apprehensions to be unfounded but there can be no objection to guaranteeing these rights subject to limited exceptions in conditions of emergency and we recommend that this should be done. *The guarantee afforded by the Constitution is the supremacy of the law and the power and duty of the Courts to enforce these rights and to annul any attempt to subvert any of them whether by legislative or administrative action or otherwise.* It was suggested to us that there should also be written into the Constitution certain principles or aims of policy which could not be enforced by the Courts. We do not accept this suggestion. Any guarantee with regard to such matters would be illusory because it would be unenforceable in law and would have to be in such general terms as to give no real security. Moreover we do not think that it is either right or practicable to attempt to limit developments of public opinion on political, social and economic policy. (Emphasis added.)

[372] It is clear from the foregoing that the fundamental liberties are protected by the Constitution, which is the supreme law, and the Judiciary is the institution that is duty bound to enforce these rights in accordance with the FC. It is the further duty of the Judiciary to ensure that the fundamental liberties are neither subverted nor annulled by legislative or administrative action or otherwise.

[373] That then was the thrust and purpose of the Reid Commission Report. It is clear beyond dispute that fundamental liberties were to be protected by the judicial arm to ensure the supremacy of the Constitution. To now argue that

the function of the judiciary to do so was somehow regulated or controlled by federal law, and thereby Parliament, is simply wrong.

[374] No construction of the meetings prior to the Report can take away the clear words in the Report and far more importantly, the FC itself, as it appears and expressly stipulates today in art 4(1) of the FC.

[375] *For these reasons I have no hesitation in dismissing the arguments of learned senior federal counsel for the AGC as having no merit. I therefore concur with the Chief Justice that leave question 3 should be answered in the negative and that s 59A is inconsistent with the FC and therefore void.*

[376] A necessary consequence of the decision above necessitates a re-visiting of the earlier decision or decisions of this court which have held that *s 59A of the Immigration Acts* is both valid and constitutional.

PIHAK BERKUASA NEGERI SABAH V SUGUMAR BALAKRISHNAN [2002] 3 MLJ 72 ('SUGUMAR BALAKRISHNAN')

[377] The facts of the case are that Sugumar Balakrishnan is a Negeri Sembilan born Malaysian who went to Sabah in August 1975 to work as a teacher. He later qualified as a lawyer and practiced law from 1985 in the state, under a work pass issued to him under the Immigration Regulations. As he is not someone who 'belongs' to Sabah the provisions of the Immigration Acts required him to obtain a pass to enter and remain in Sabah.

[378] In 1995 he applied for an entry permit for a period of two years, which was granted and would expire in 1997. It was common ground that on the completion of that two years he would be treated as 'belonging' to Sabah under s 71 of the Acts.

[379] However, some six weeks prior to the expiry of this last permit, he was served with a notice of cancellation of his entry permit under s 65(1)(c) of the Acts issued by the Director of Immigration, Sabah.

[380] Sugumar applied for an order of certiorari to quash the decision of the director but failed to obtain a stay of the cancellation of the entry permit. The High Court refused certiorari.

[381] The Court of Appeal, in an illuminating and oft-quoted decision speaking through Gopal Sri Ram JCA (later FCJ) allowed the stay, and went on to grant the relief of judicial review sought. Of significance for the purposes of this appeal is that Gopal Sri Ram JCA was of the view that s 59A of the Immigration Acts could not, and did not, preclude the High Court from

exercising its powers of judicial review to examine the validity of the exercise of the administrative powers conferred by the Acts, on both substantive as well as procedural grounds.

[382] He went on to consider whether an objective or subjective test ought to be satisfied in undertaking such judicial review, concluding that the former comprised the correct approach.

[383] Leave was granted to appeal to this court on several questions of law. For the purposes of question 3 in this appeal, the relevant question of law examined in that case related to the effect of *ss 59 and 59A of the Immigration Acts, and whether these statutory provisions effectively excluded review* in respect of any direction given by the state authority on any ground, save for questions relating to procedural compliance. This court also considered what it stated to be the wider issue of whether ouster clauses of the type stipulated in *s 59A* can preclude the court from exercising its powers of judicial review over the decision of public decision makers.

[384] Mohammad Dzaiddin FCJ held in relation to this issue as follows:

(a) the ouster clause comprising s 59A provides for the exclusion of judicial review save for procedural non-compliance. He accepted that it was clear from the explanatory statement to the bill that the intention of Parliament in amending s 59A was to exclude judicial review by the court of any act done or any decision of the minister or the director general or the state authority. He accepted, on the strength of a 1949 decision of the Privy Council in *DR Fraser and Company, Limited v Minister of National Revenue* [1949] AC 24 the reasoning that the amending Acts having altered the language of the principal statute, must have been taken to have been done deliberately;

(b) given the 'elaborately expressed and more exclusionary' scope of *s 59A* compared to the earlier provision, Parliament must have intended that the section is conclusive on the exclusion of judicial review. As such it was not permissible for the courts to intervene and disturb a statutorily unreviewable decision on the basis of a new amorphous and wide ranging concept of substantive unfairness as a separate ground of judicial review which even the English courts in common law have not recognized; and

(c) relying on English law, more particularly *Pyx Granite Co Ltd v Ministry of Housing and Local Government & Ors* [1960] AC 260, this court subscribed to the English principles of administrative judicial review where a citizen's right to seek redress from the courts could be excluded by clear words. Therefore, no judicial review was permissible by virtue of s 59A as it presently stands.

[385] Given the reasoning I have set out in the course of this concurring judgment in relation to art 4(1) of the FC, I have no option but to conclude that in *Sugumar Balakrishnan* this court, with the greatest respect, failed to consider the following fundamental matters:

(a) we are governed by the FC and practice constitutional supremacy unlike the United Kingdom which is governed by Parliamentary supremacy. The net result is that in the UK the principles expounded relate to administrative judicial review. As Parliament is supreme in that jurisdiction, the courts can only undertake administrative judicial review on the principles as set out for example in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 ('CCSU');

(b) in this jurisdiction the constitutional right of review is entrenched in art 4(1) of the FC as explained earlier. Therefore, given that we are governed by constitutional supremacy, it is necessary that all legislation falls within the purview of the Constitution. Even Parliament cannot legislate outside its purview. And as the Judiciary is the check and balance to ensure such compliance, any statutory provision seeking to preclude the courts from discharging their duty to ensure compliance with the FC is in itself unconstitutional;

(c) Parliament's intention in s 59A may well have been crystal clear. However, the pertinent question is whether the statutory provision complies with the FC. This court in *Sugumar Balakrishnan* failed to ask itself this crucial question and to that extent, again with great respect, misapprehended its function and, again with respect, conflated it with that of the courts in the UK. In doing so, it failed to undertake the crucial duty of ensuring compliance with the FC; and

(d) accordingly, this court's conclusion in *Sugumar Balakrishnan* that judicial review could be excluded by clear words in a statute is flawed in a fundamental respect. The FC clearly allows for review of all laws, so any attempt to block the Judiciary from undertaking that review is inconsistent with the express provisions of the FC, namely art 4(1) of the FC. As such an ouster clause contravenes art 4(1) of the FC, it follows that such a statutory provision is void for inconsistency with the FC.

[386] It is therefore necessary to depart from the decision of this court in *Sugumar Balakrishan*, as it is not consonant with the position in law in Malaysia where we are governed by constitutional supremacy and not Parliamentary sovereignty.

SUMMARY OF QUESTION 3

[387] The enactment of a statutory provision by Parliament denuding the Judiciary of its inherent powers of review, even partially, is not constitutional,

by reason of art 4(1) of the FC. Article 4(1) of the FC encapsulates the doctrines of the Rule of Law and significantly the separation of powers. In other words, these doctrines are not extraneous or imported concepts but comprise the basis of our FC.

[388] Question 3 relates to the constitutional validity of s 59A of the Immigration Acts 1959/63. Section 59A is an ouster clause. That means that the clause enacted by Parliament seeks to prohibit the court from examining the section for constitutional validity. Can Parliament do that? In England Parliament can do that because there is no written constitution as the highest source of law, and Parliament is supreme. However, in Malaysia our Federal Constitution is supreme as borne out by art 4(1) of the FC.

[389] Judicial power in art 121(1) shoud be read subject to art 4(1) of the FC. Article 121(1) deals with judicial power. I have held that:

(a) art 121(1) cannot be construed in isolation. The starting point for the construction of judicial power in art 121(1) must be art 4(1). Why is that?

(b) it stipulates that the Federal Constitution is the supreme law of the land; in its second part it empowers the Judiciary to strike down any law that is inconsistent with the Federal Constitution to the extent of the inconsistency;

(c) as only the superior courts can carry out this function, it follows that art 4(1) enshrines the constitutional right of judicial review;

(d) the constitutional right of judicial review is to be contrasted with administrative judicial review;

(e) constitutional judicial review means that the superior courts can test the constitutional validity of legislation and State action. Administrative judicial review is limited to reviewing State action for illegality, irrationality, proportionality and procedural impropriety. The latter is a very limited and narrow right of review when compared with constitutional judicial review which allows statutes and acts made under those statutes to be struck down and held to be void;

(f) as this primary power of judicial review is contained in arts 4(1) and 121(1) of the FC, which is the source of judicial power, has to be read together with art 4(1). This is why it cannot be read in isolation;

(g) this entire construction only arises by reason of the 1988 constitutional amendment to art 121(1) which many have unders tood to have abrogated judicial power and made the Judiciary subordinate to Parliament;

(h) I have held that this is a flawed construction because art 121(1) must be read subject to and harmoniously with art 121(1) of the FC. This is because art 4(1) encapsulates the rule of law and the separation of powers. It is important to comprehend that you do not need to utilize the express words 'separation of powers' and 'rule of law' in art 4(1) in order for that article to be construed as encompassing those principles;

(i) reading art 4(1) which contains the power of constitutional judicial review together with art 121(1), it follows that judicial power was never abrogated or removed by the 1988 amendment to the FC;

(j) the words in the amendment which gave rise to debate are '... and High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law';

(k) this was understood to mean that the jurisdiction and powers of the superior courts was limited or abrogated to the extent determined by Parliament. A literal reading meant that the superior courts were subordinated to Parliament;

(l) but how can this be a correct interpretation when art 4(1) allows federal law to be struck down when it is inconsistent with any provision of the Federal Constitution? Put another way, how can the superior judiciary on the one hand be expressly allowed to strike down law, which includes federal law, and at the same time be subordinated to that same federal law? It is a legally incoherent proposition;

(m) therefore, the only tenable answer is that the words 'shall have the jurisdiction and powers as may be conferred by or under federal law' is that only the specification, description and arrangement of the powers of the superior courts is to be enacted by Parliament;

(n) any such description or listing or setting out of the powers of the various courts in the hierarchy of the judicial arm of government by Parliament cannot derogate from the powers of the courts to act as a check and balance vis a vis the execut ive and the Legislature as expressly decreed in art 4(1) of the FC;

(o) another reason why judicial power ought to be construed as stated is that our system of government is premised on a constitutional democracy which stipulates that the three arms of government, namely the Legislature, judiciary and executive are co-equal. If the construction of the majority judgment is correct, it would amount to taking away the co-equal foundational basis of the Constitution and government in the nation, which is unsupportable as such a view endorses the construction that the Judiciary is subordinated to Parliament;

(p) finally, another line of reasoning that supports such a harmonious construction is that 'law' or 'federal law' as stated in art 121(1) of the FC

must have the same meaning as 'law' in art 4(1) of the FC. If not so, and the word 'law' in both art icles carry different meanings, there would be confusion and the FC would be anomalous, unpredictable and unreliable, which cannot be correct;

(q) so, in answer to the question whether the jurisdiction and powers of the High Courts was curtailed by the 1988 a mendment the answer is that it did not have that effect. The Legislature did not and could not remove any part of the judicial power of the High Courts by virtue of the amendment;

(r) if the 1988 constitutional amendment is nonetheless construed as having the effect of abrogating or diminishing or removing the constitutional power of review, which subsists to ensure the supremacy of the FC, it is void and struck down, as art 4(1) of the FC comprises a part of the integral or basic components of the FC;

(s) therefore, I conclude that s 59A of the Immigration Acts is void as it seeks to oust the right of constitutio nal judicial review in art 4(1);

(t) this is consonant with the unanimous decisions of this court in *Semenyih Jaya* and *Indira Gandhi* which both held that the superior courts enjoy such a power of review as a basic feature of the FC;

(u) it therefore follows that the decision of this court in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72 which upheld the constitutionality of s 59A of the Immigration Acts is no longer good law because it failed to consider the constitutional right of judicial review in art 4(1); and

(v) question 3 is answered in the negative.

Question 1: Whether s 3(2) of the Immigration Acts (Act 155) empowers the Director General to unfettered discretion to impose a travel ban? In particular, can the Director General impose a travel ban for reasons that impinge on the democratic rights of citizens such as criticizing the government?

[390] I would respectfully concur with the learned Chief Justice's superb exposition of the law in relation to question 1 and the answers given. This question was answered in the negative. The significant consequence of these answers is that the right to travel abroad has been recognized as a fundamental right housed under art 5(1) of the FC. This adds to the body of rights that have, over the years been construed by the Judiciary to amount to fundamental rights falling within the ambit of art 5(1) of the FC, ie the right to life.

[391] The other consequence is that the decision of this court in *Government of Malaysia & Ors v Loh Wai Kong* [1979] 2 MLJ 33 ('Loh Wai Kong') is no longer good law. So too the decision of the Court of Appeal in *Pua Kiam Wee*

v Ketua Pengarah Imigresen Malaysia & Anor [2018] 6 MLJ 670 which relied on *Loh Wai Kong*. Although those cases relate primarily to the issuance of passports, and the present appeal relates to the right to travel abroad when holding a valid passport, the fundamental issue underscoring these cases is the same.

[392] That underlying issue relates to whether the right to travel, not only within but abroad, comprises a fundamental right of a citizen of Malaysia falling within the 'right to life' guaranteed under art 5(1) of the FC.

[393] All these cases turned on whether there was a right either to be issued a passport to travel abroad, or to simply travel abroad within art 5(1) of the FC. The said article comprises a guarantee against State action subject, of course to the restrictions set out in the FC. I concur with the Chief Justice that the right to travel abroad is indeed such a fundamental right falling within the right to life. And such a fundamental right can be curtailed provided such curtailment is in accordance with 'law' as provided in art 5(1) of the FC.

[394] 'Law' has been defined in *Alma Nudo* as encompassing the essential characteristics of being, if I may paraphrase, fair, just and proportionate or reasonable, and neither arbitrary nor capricious, both in relation to substantive and procedural law (see also the dissenting judgment in *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277).

[395] As expounded by the learned Chief Justice, a key authority from the Indian Supreme Court which examined and analysed this issue in extenso, is *Maneka Gandhi v Union of India* 1978 AIR SC 597; (1978) 1 SCC 248. There the Indian Supreme Court held, inter alia, that the right to tra vel abroad is a fundamental right under their art 21, which is similar to our art 5(1) of the FC (save that the Indian Constitution subjects the right to life to the 'due process of law' while the FC states 'save in accordance with law'). I do not propose to examine the extensive reasoning there in light of the judgment of the Chief Justice, which does so.

[396] The Indian Supreme Court has further held that a person having a valid passport 'cannot be interdicted nor can be prevented from traveling abroad merely on the basis of some oral order' (see *Sri-La-Sri Arunagiritnathar v State of Tamil Nadu and another* AIR 1989 Mad 3).

THE CONSTRUCTION AFFORDED TO ART 5(1) OF THE FC

[397] Article 5(1) of the FC more particularly 'life' was, in the course of the evolution of our constitutional law, construed in a limited sense, so as not to include livelihood. But the narrowness of this construction was put to rest by

the generous construction afforded to this article in, inter alia, *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 per Gopal Sri Ram JCA (later FCJ) where the right to education was accepted as a part of the right to life, and again the decision of the Court of Appeal in *Sugumar Balakrishnan* per Gopal Sri Ram JCA (later FCJ) where the right to earn a livelihood and thereby the right to travel to, and remain at the place of work, was further recognized as a right to livelihood falling within the purview of art 5(1) of the FC. A series of subsequent cases, including the right to a livelihood and the right to a fair trial, have all contributed to building up on the body of rights encompassed within the few precious words of art 5(1) of the FC, namely the 'right to life'.

[398] In so saying, I have focused on the more ancillary or supplementary aspects of the right to life. The primary construction must be the right to live, which is the most fundamental of all human rights, followed by the right of personal liberty and not to be detained, save in accordance with law. These latter rights deal with the sanctity of life and liberty and any encroachment of such rights must of course be scrutinised with great care.

[399] However, the move away from a restricted approach to the construction of art 5(1) of the FC represents one of the most important developments in constitutional law in our legal history. The rectitude of such a construction cannot be denied because *the right to life means the right to live with basic human dignity, which is the purport of the Federal Constitution particularly in relation to fundamental liberties*.

[400] When the framers of our Constitution recommended Part II on fundamental rights, which was accepted and comprises a part of our FC, the intention was to ensure certain basic rights which are inherent to, and subsist in every human being and which are essential for him to develop and live fully. These rights also represent the basic values of a civilized society. It was in recognition of these vital rights that they were accorded a place in Part II of the FC. They comprise the fundamental rights (see *Maneka Gandhi v Union of India* 1978 AIR SC 597; (1978) 1 SCC 248) ('Maneka Gandhi').

[401] However, these rights, although fundamental, are subject to restriction on the grounds as set out in the FC. Compendiously, such restrictions may be described as being in the public interest or protection. In short, individual liberty is subordinated to public or social interests as expressly provided for in the provisions of the FC.

[402] The right to travel abroad is now added to the list of essential rights comprising a part of the right to life. The list is by no means exhaustive. It has and will continue to evolve to meet the changing needs of our society, country

and the world. As stated per Raja Azlan Shah LP in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi vin Syed Idrus* [1981] 1 MLJ 29; [1984] 1 CLJ 28; [1984] 1 CLJ Rep 98, the Constitution is a living piece of legislation, and accordingly its provisions should be construed broadly and generally, not narrowly nor restrictively (see also *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356 where Abdoolcader J (as he then was) reiterated that a '... constitution should be considered with less rigidity and more generosity than other statutes ...').

[403] In an effort to ensure that the rights of citizens are not abrogated wrongfully, the state enforces those rights against itself (see *IC Golak Nath v State of Punjab* 1967 AIR 1643 per Hidyatullah J). Article 4(1) of the FC ensures that the judicial arm strictly scrutinizes statutes or executive action to determine whether the law violates the provisions of the FC.

[404] On the facts of the instant appeal it therefore follows that the decision of the Minister, executed by the Director General through his officers, in preventing Maria Chin from travelling abroad, despite having possession of a valid passport, amounts to a contravention of a fundamental right. And that fundamental right is ensconced in art 5(1) of the FC namely the right to life which is construed to include the right to travel abroad save and unless such right is curtailed by law. There was no such valid curtailment 'in accordance with law' as envisaged in art 5(1). Accordingly, the restraint and restrict ion imposed by the Minister and thereby the Director General who executed the content of the circular, is inconsistent with art 5(1) and is void.

[405] On an administrative review level, the case-law in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1 at p 48 adopted the pronouncement of the English courts to the effect that neither the statute nor the circular can 'effect a fundamental alteration in the general law relating to the rights of persons on whom they are imposed, unless the power to effect such an alteration is expressed in the clearest possible terms. This is no more than an application of the general principle that no statute is to be construed as effecting a substantial alteration in the law beyond what it expressly declares ...' (see also Suriyadi FCJ in *Malayan Banking Bhd v Chairman of Sarawak Housing Developers' Association* [2014] 5 MLJ 169 at p 178 (ABA Vol 1/Tab 16/p 226)).

[406] It follows that s 3(2) of the Immigration Acts does not in any manner, empower either the Minister or the Director General of Immigration, to issue a circular precluding a citizen holding a valid passport from travelling abroad to attend an awards ceremony and a conference, on the grounds that it is suspected that she may 'memburukkan nama kerajaan atau negara' ie taint the image of the government or the country.

[407] Applying the principles in *CCSU*, it follows that the acts of the Minister and the Director General in executing the content of the circular by restricting Maria Chin from travelling to Korea are void for being in made in excess of their powers or jurisdiction. Additionally, the acts were irrational and bereft of natural justice.

[408] I wish only to add one further dimens ion to the analysis in the judgment of the Chief J ustice in relation to question 1.

RESTRICTION TO THE RIGHT OF FREEDOM OF SPEECH AND EXPRESSION

[409] While the immediate consequence of the Minister and the Director General's acts amounted to a restriction of Maria Chin's right of travel abroad, the further consequence is that her right to freedom of speech and expression were hindered. This is because the ultimate purpose of the travel abroad was to accept her award, and to participate in a related conference. Such participation would necessarily involve Maria Chin speaking and expressing her views on a series of matters relating to the fundamental freedoms.

[410] Article 10 of the FC guarantees freedom of speech and expression subject to restrictions as set out in sub-arts (2), (3) and (4) which relate in essence to security, public order and morality.

[411] The need for freedom of speech and expression is inherent in any democra cy. As stated by Bhagwati J in *Maneka Gandhi v Union of India* 1978 AIR SC 597; (1978) 1 SCC 248:

> ... Democracy is based essentially on free debate and open discussion, for, that is the only corrective of Government action in a democratic set up. If democracy means Government of the people, by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intellectually exercise his right of making a choice, free and general discussion of public matters is absolutely essential.

[412] In short, freedom of speech is the cornerstone of a democratic Government. It is essential to ensure the democratic process is functioning. A free exchange of ideas, dissemination of information without restraint, dissemination of knowledge, stating different viewpoints, debating and forming one's own views and expressing them, are all the hallmarks of a free democratic society such as ours. Any restraint on this right, save as expressly provided for in the FC, is jealously scrutinized by the courts.

[413] In the instant case, the circular and the subsequent action of the Director General and his officers effectively trammelled upon, and precluded

Maria Chin from exercising her right of freedom of speech and expression, by prohibit ing her from travelling abroad to attend and participate in the conference.

[414] More significantly, the contents of the circular issued by the Minister and executed by the Director General, do not fall within the purview of the restrictions in art 10(2), (3) or (4). Neither the Minister nor the Director General can rely on s 3(2) of the Immigration Acts, which is general in nature, to deprive Maria Chin of this fundamental right. To reiterate, apart from the fact that 'memburukkan Kerajaan Malaysia' does not fall within the purview of s 3(2) of the Immigration Acts, it does not fall within the restrictions of the FC as set out above.

[415] The FC envisages that while a citizen enjoys a right to freedom of speech and expression, there is a corresponding duty on the state to ensure that every citizen is able to exercise this fundamental right in a safe environment. The acts of the Minister in issuing the circular and that of the Director General in administering or executing it, transgresses not only the citizen's fundamental right, but also fails in that the state failed to provide a safe environment to exercise that right.

[416] On the contrary, the state, through the Minister and the Director General, by their positive acts, took away any ability to exercise such a right. The overarching purpose of the circular was to prevent the right of a citizen to discuss openly or express an opinion about the social, economic or political aspects of government. As stated earlier, the attempt to remove the right to express, exchange and debate views or opinions in relation to the government, interferes with a fundamental aspect of democracy, given that the liberty to speak and express one's view is given the highest order of priority in a functioning democracy. The fact that this right was to be exercised on foreign soil makes no difference. The right is inherent to the citizen, Maria Chin, and does not stop on the shores of Malaysia.

[417] Therefore, there was a curtailment or encroachment upon Maria Chin's fundamental rights both to:

(a) travel abroad, a right now recognised as falling within the coterie of fundamental rights generated from art 5(1) of the FC; and

(b) the right to freedom of speech and expression under art 10 of the FC.

[418] It is, to my mind, beyond dispute that the acts of both the Minister and the Director General purportedly exercised under the provisions of the Immigration Acts are void by reason of:

(a) a contravention of arts 5(1) and 10 of the FC at a constitutional level; and

(b) these officials, having acted without the requisite power to do so under the Immigration Acts, as well as acting irrationally and in a manner no reasonable person similarly circumstanced would have, under the statute. This is from an administrative judicial review perspective.

CONSTITUTIONAL REVIEW AND ADMINISTRATIVE JUDICIAL REVIEW — BOTH TENETS OF THE FC

[419] It is of note that the Chief Justice's analysis of the law in relation to the issues raised, have addressed these matters both from a constitutional and administrative law perspective, thereby providing, with respect, a full and complete analysis and consideration of the issues.

[420] Previously, much of the focus of this court throughout the years, focused primarily on administrative judicial review, ignoring the constitutional underpinnings of our FC, which expressly provide for review to ensure compliance with the Constitution, ie constitutional judicial review. The reason for an adherence to solely administrative principles of judicial review can possibly be traced to our reliance on the English approach, and the utilisation of primarily English case-law, as a consequence of our colonial past.

[421] It is however important, that in the development and continuing evolution of Malaysian law, we recognise and assert the law as envisaged and expressly provided for under the FC.

[422] We are, after all, not a nation practicing parliamentary sovereignty, but constitutional supremacy. As such, the adoption of English authorities in their entirety, particularly in the field of constitutional law, results in decisions that fail to consider the fundamentals of our Constitution. The Chief Justice's treatment and analysis of the issues in this appeal signal the way forward towards the development of the law of our nation and Malaysian common law in accordance with the principles of the FC.

QUESTION 2: THE CONSTITUTIONALITY OF S 59 OF THE IMMIGRATION ACT

[423] Again, I would respectfully concur with the judgment of the learned Chief Justice on question 2 in relation to the constitutional validity of s 59 of the Immigration Acts I only seek to make the following additional observations by way of addendum to the scholarly analysis of the Chief Justice.

NATURAL JUSTICE

[424] Section 59 of the Immigration Acts expressly excludes the right to be heard in respect of any order made by the Minister, Director General or in the case of an East Malaysian State, the State Authority. The person or class of persons affected by such order which may be made under the Immigration Acts or its subsidiary legislation cannot be heard.

[425] This means that if the Minister, or the Director General and his officers, in the exercise of their powers determine that any person or class of persons is to be precluded from travelling abroad, or is seeking the issuance of a passport or the renewal of a passport, any decision of these authorities prohibiting or refusing the same, does not require any explanation from them. Neither will the person aggrieved be accorded an opportunity to present his or their case before the authorities before or after such a decision is made.

CAN QUASI-JUDICIAL POWERS BE INVOKED TO REMOVE FUNDAMENTAL RIGHTS WITHOUT NATURAL JUSTICE?

[426] The rights which are affected by any such acts of these authorities is fundamental in nature, as they fall within the purview of art 5(1) of the FC. The power to so remove or restrict such a fundamental right, namely the right to travel freely, has been vested by Parliament in these authorities, namely the Minister, Director General and his officers under the Immigration Acts.

[427] As these powers extend to the curtailment of fundamental rights, they are quasi-judicial in nature. For example, the power to impound a passport, or to prevent a person holding a valid passport from travelling abroad, is quasi-judicial in nature. Any such removal must therefore comply with the principle of natural justice.

[428] Natural justice in this sense extends to the manner of exercising the power and the need to give reasons for such curtailment. In the present context it means that as the Minister prior to issuing the circular, and more specifically, prior to applying it in Maria Chin's case, ought to have accorded her the opportunity to be heard. There was ample opportunity to do so, as she only sought to travel several months after issuance of the circular. There was ample time for the Minister to have given her notice both of the fact of the circular and for her to explain why any such blacklisting ought not to apply to her. Having considered her representations, and if he had still come to the same conclusion, he ought to have written to her and set out the reasons why he was still impelled to preclude her from such travel.

[429] That would have been compliance with the principles of natural justice. It would have accorded Maria Chin to have challenged the decision too. However as is evident in this case, none of this was done.

[430] Put another way, where the civil rights of an individual are affected by an administrative action, natural justice ought to be complied with.

[431] In the Indian Supreme Court case of *Nawabkhan Abbaskhan v The State of Gujarat* 1974 AIR 1471 an order of externment or banishment was made against the aggrieved person. The Indian Supreme Court held that such an order which affected a fundamental right under the Constitution, namely the right to move freely within India, and which was made without affording the affected person the right to be heard, was void. In that case the statute required that a hearing be accorded, unlike the Immigration Acts here. However, the underlying principle is immutable, namely that an order made by an authority pursuant to a statute which infringes a fundamental freedom, passed without adherence to the *audi alteram partem* rule is a nullity.

[432] And as meticulously conside red in the Chief Justice's judgment, in *Maneka Gandhi v Union of India* it was held that the power to impound a passport is quasi-judicial in nature, and the rules of natural justice would apply when exercising the power, which also required the recording of reasons. Therefore, the exercise of a statutory power by the Legislature or Executive seeking to remove or curtail a fundamental right, requires the principles of natural justice to be complied with. Any attempt to exclude the right to be heard statutorily is void.

[433] This in turn is because the art 5(1) of the FC guarantees the right to travel abroad freely, save in accordance with law. The term 'law' in art 5(1) of the FC has been considered and defined in some detail in *Alma Nudo Atenza*. I adopted the definition of 'law' and summarised the authorities on this point in the dissenting judgment in *Letitia Bosman v Public Prosecutor & other sppeals*:

> ... As stated variously in *Lee Kwan Woh v PP (above), Alma Nudo (above), Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285 and *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 the term 'law' in the proviso to art 5(1) encompasses:
>
> (a) *'Law'* as defined in *art 160(2) of the FC*, namely written law, the common law in so far as it is in operation in the Federation or any part thereof, any custom or usage having the force of law in the Federation or any part thereof;
>
> (b) *'common law'* as defined under *section 66 of the Consolidated Interpretation Acts of 1948 and 1967* as 'the common law of England';
>
> (c) *the rule of law* see paragraphs 103–104 of *Alma Nudo* which explains the

rule of law and specifies that 'law' must therefore be clear, stable, gene rally prospective, of general application, administered by an independent judiciary and which incorporates the right to a fair trial; and includes

(d) *the rules of natural justice*.

[434] This last aspect relating to natural justice is specifically borne out by *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64, where in dealing with arts 9 and 12 of the Singapore Constitution, which are in pari materia with arts 5 and 8 of the FC, the need for compliance with the rules of natural justice were expressly specified by Lord Diplock.

[435] From the foregoing synopsis and study relating to the term *'law' in the proviso to art 5(1) of the FC*, it is evident that any such law, *must be law that is fair, just and reasonable. It cannot be unfair or unjust, both from a procedural as w ell as a substantive aspect* (see *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631').

[436] There is a fundamental reason for the expansive and generous definition afforded to the term 'law' in the FC. Any other reading would not be consonant with art 4(1) of the FC which requires that all laws be consistent with the FC.

[437] Therefore from the foregoing definition, it follows that the Immigration Act, being the 'law' depriving Maria Chin of her right to travel abroad despite holding a valid passport, has to be 'law' that is fair, just and reasonable from both a procedural as well as a substantive aspect. Natural justice therefore comprises an element that has to be complied with.

[438] In other words, any restriction or abrogation of the right to travel in a statute should comply with, inter alia, the principles of natural justice, by affording the aggrieved person an opportunity of being heard. Notice should be given that the right is to be curtailed and reasons afforded for the same. An opportunity to respond ought to be accorded and reasons for any final decision given to the aggrieved person. In an extreme situation where the exigency of the same requires an immediate prohibition of the right of travel, a post-hearing or opportunit y might serve to achieve compliance with the principles of natural justice. Each case will turn on i ts particular facts. However in the instant case it is evident that there was more than sufficient time to accord Maria Chin an opportunity to be heard before 'blacklisting' her, and prohibiting her from travelling.

[439] Section 59 of the Immigration Acts fails on all fronts to comply with the term 'law' as is defined and understood under the FC, more particularly art 5(1) of the FC. *Therefore as it is inconsistent with art 5(1) of the FC, s 59 of*

the Immigration Acts is consequently, void.

REMEDIES OR REDRESS TO BE AFFORDED TO MARIA CHIN

[440] With respect, I concur entirely with the judgement of the Chief Justice on this aspect and have nothing further to add.

Abdul Rahman Sebli FCJ (delivering majority judgment of the court):

THE FACTS

[441] The appellant was the chairperson of a non-governmental organisation (NGO) known as 'Bersih 2.0' and was a holder of a valid Malaysian passport. On 15 May 2016, after collecting her boarding pass at the Kuala Lumpur International Airport for a flight to South Korea, she was stopped by the immigration authorities and was told that there was a travel ban imposed on her and that she could not leave the country.

[442] No reason was given to the appellant for the travel ban, before or after the incident. The reason was only disclosed in the first respondent's affidavit filed in response to the present judicial review proceedings commenced by the appellant in the High Court on 28 July 2016.

[443] In gist, it was deposed to in the affidavit that on the first respondent's instruction, the appellant was blacklisted from leaving the country for a period of up to three years starting from 6 January 2016. The instruction was made pursuant to a circular titled 'Pekeliling Imigresen Malaysia Terhad Bil 3 Tahun 2015'. The ground for the blacklisting was that the appellant had disparaged the Government of Malaysia ('Memburukkan Kerajaan Malaysia') at different forums and illegal assemblies.

[444] The blacklisting and travel ban were however lifted by the respondents on 17 May 2016, ie two days after she was stopped at the Kuala Lumpur International Airport.

THE COMPLAINT

[445] According to the appellant, the facts as shown in the affidavit of the first respondent referred to events that had yet to occur when the travel ban was imposed. This, according to counsel, implies an admission that at the time the ban was imposed there was no real reason for its imposition and yet the respondents relied on s 59A of the Immigration Act 1959/63 ('the Immigration Act') to say that even where there are no real reasons to justify the ban, their decision must be accepted and condoned by the court regardless and this begs

the question: to whom will the citizen then turn when there is a contestation between the executive and the citizenry?

[446] It is the appellant's case that the inevitable consequence of the appellant's travel ban was to interfere with her freedom of speech guaranteed by art 10(1) of the Federal Constitution, in particular her freedom to speak at an event in South Korea to receive a human rights prize in her capacity as a member of an NGO.

[447] On 28 July 2016, the appellant filed an application to judicially review the impugned decision on, inter alia, the following grounds; that the impugned decision is baseless, unreasonable, irrational and completely unfair; and that the first and/or second respondent erred in law when they:

(a) acted ultra vires and in excess of jurisdiction because there is no provision under the Immigration Act and/or other relevant statutes to bar a citizen from travelling overseas in similar circumstances;

(b) acted in breach of her fundamental right to travel abroad which right stems from the right to life under art 5(1) of the Federal Constitution;

(c) acted in violation of her legitimate expectation to travel abroad due to the fact that at all material times, she possessed a valid passport and was never once informed at a reasonable period beforehand that she was going to be barred from travelling overseas;

(d) acted in breach of the principles of natural justice as guaranteed by the Federal Constitution and established principles of administrative law in arriving at the impugned decision without according her the right to be heard and/or opportunity to be consulted;

(e) acted in breach of the requirements of procedural fairness when they failed to provide her with any grounds and/or reasons for the impugned decision and/or failed to respond at all to her reasonable query;

(f) failed to take into account the relevant consideration that she was travelling to South Korea to attend a human rights conference and receive a prestigious and internationally recognised award on behalf of a Malaysian NGO before an international audience; and

(g) acted and conducted themselves in an irrational manner inconsistent with any other reasonable government authority tasked with an immigration policy and the welfare of its citizens.

THE RELIEFS SOUGHT

[448] The reliefs sought by the appellant in the High Court were the following:

(i) an order of certiorari to quash the decision made by the respondents to blacklist the appellant from travelling overseas, which was brought to the appellant's attention on the day she was scheduled to leave Malaysia on 15 May 2016 ('Impugned Decision');

(ii) a declaration that the Impugned Decision made by the respondents to blacklist the appellant from travelling overseas in the circumstances is a breach of art 5(1), art 8 and/or art 10(1)(a) of the Federal Constitution and as a result, unconstitutional and void;

(iii) a declaration that the respondents do not have the power to reach the Impugned Decision and therefore acted in excess of jurisdiction;

(iv) a declaration that the respondents do not have an unfettered discretion in arriving at the Impugned Decision;

(v) a declaration that the respondents cannot act under section 59 of the Immigration Act 1959/63 to deny the appellant a right to natural justice as this is in violation of the Federal Constitution in particular art 160 read together with art 4 of the Federal Constitution and relevant case law;

(vi) a declaration that the following provisions of the Immigration Act 1959/63 are unconstitutional:

(a) section 59 which excludes the right to be heard; and/or

(b) section 59A which excludes judicial review.

(vii) an order of prohibition to prevent the respondents from making any subsequent decisions to blacklist the appellant from travelling overseas in similar circumstances; and

(viii) in the alternative to (vi), an order of prohibition to prevent the respondents from making any subsequent decisions to blacklist the appellant from travelling overseas without furnishing her with the reasons and according her a right to be heard.

THE HIGH COURT DECISION

[449] The High Court dismissed the appellant's application for judicial review, essentially on the ground that since there is no constitutional right for a citizen to travel abroad as decided by the former Federal Court in *Government of Malaysia & Ors v Loh Wai Kong* [1979] 2 MLJ 33; [1979] 1 LNS 22, the government has the power to stop a citizen from leaving the country.

[450] As for the appellant's challenge on the right to be heard, the High Court held that the right is expressly excluded by s 59 of the Immigration Act. It was further held that there is no statutory obligation reposed in the respondents to provide any reason for the travel ban or to inform the appellant of the reason.

A THE DECISION OF THE COURT OF APPEAL

[451] The appellant's appeal to the Court of Appeal was dismissed on the ground that it was rendered academic and hypothetical as the travel ban had been lifted. Relying on this court's decision in *Husli @ Husly bin Mok (suing as administrator of the estate of Mok bin Tuan, deceased) v Superintendent of Lands and Surveys & Anor* [2014] 6 MLJ 766; [2014] 9 CLJ 733, the Court of Appeal held that there was no utility in granting the declarations sought as there was no longer any live issue with the lifting of the travel ban.

[452] Crucially it was held that the issue before the court was the discretionary power of the respondents whose decision under s 59A of the Immigration Act is not amenable to judicial review.

THE PRELIMINARY ISSUE

[453] At the outset of these proceedings, the respondents raised a preliminary objection that the impugned decision sought to be challenged in the present appeal was rendered academic even before the commencement of the judicial review at the High Court as the travel ban had been lifted. It was submitted that there was no longer any real grievance to ground a judicial review.

[454] It was submitted that on the facts of the present appeal, as a matter of discretion, this court should refuse the invitation to consider the academic issues for the following reasons:

(a) there are no reported cases where one was barred from leaving the country solely on ground of having ridiculed the country. The present appeal is therefore only peculiar to its facts;

(b) even if this court were to proceed with the appeal on the narrow basis of question 1 and/or question 2, the appellant still needs to pass the first hurdle imposed by the ouster clause as set out in question 3; and

(c) this court in *Loh Wai Kong* and *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72; [2002] 4 CLJ 105 (*Sugumar Balakrishnan*) has considered and authoritatively adjudged upon the same issues raised in question 2 and question 3.

[455] The appellant, on the other hand, argued that the matter has not been rendered academic and that even if it is academic, this court should nonetheless proceed to determine the lawfulness of the decision due to the overwhelming public interest involved, citing *Regina v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450 which this court accepted in *Bar Council Malaysia v Tun Dato' Seri Arifin bin Zakaria & Ors (Persatuan Peguam-Peguam Muslim Malaysia, intervener) and another appeal* [2020] 4

MLJ 773; [2018] 10 CLJ 129.

[456] Courts are generally circumspect in exercising their discretion to hear hypothetical issues even in the area of constitutional law which is part of public law and the matter should be approached on a narrow basis: see *Tan Eng Hong v Attorney-General* [2012] SGCA 45 and as a general rule, the apex court has been consistent against answering abstract, academic, or hypothetical questions: see *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2020] 4 MLJ 133.

[457] The general principles applicable to a declaration based on public interest to overcome what is otherwise an academic exercise are summarised in *Rolls-Royce plc v Unite the Union* [2010] ICR 1 as modified in *Milebush Properties Ltd v Tameside Metropolitan Borough Council* [2011] EWCA Civ 270. The two main features of the limitation of the court's discretion are justice of the case and the utility of the adopted measure.

[458] Having considered the competing arguments by the parties, I saw no merit in the preliminary objection raised and was of the firm view that this appeal must be heard on the merits.

THE LEAVE QUESTIONS

[459] There were three leave questions posed for this court's determination and they were as follows:

> Question 1
>
> Whether section 3(2) of the Immigration Act empowers the Director General the unfettered discretion to impose a travel ban. In particular, can the Director General impose a travel ban for reasons that impinge on the democratic rights of citizens such as criticizing the government?
>
> Question 2
>
> Whether section 59 of the Immigration Act is valid and constitutional?
>
> Question 3
>
> Whether section 59A of the Immigration Act is valid and constitutional in the light of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545?

[460] The three questions are related one way or another and shall be dealt with together for convenience rather than to be considered separately in three different parts. Obviously the answers to questions 1 and 2 hinge on the answer

to question 3, which is intrinsically concerned with the constitutional validity of ouster clauses. Given its importance in terms of priority, I shall begin with question 3.

[461] It is relevant to note that what question 3 asks is whether s 59A of the Immigration Act is valid and constitutional 'in the light' of the decisions of this court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 (*Semenyih Jaya*) and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 (*Indira Gandhi*), cases which reaffirmed the principle that judicial power resides in the judiciary under the doctrine of separation of powers and which, according to the two cases, cannot be abrogated or removed even by constitutional amendment.

[462] Question 3 does not ask whether s 59A of the Immigration Act is inconsistent with any provision of the Federal Constitution and therefore void under art 4(1). Specifically, it does not ask whether the section is void under art 4(1) for being inconsistent with art 121(1) of the Federal Constitution, which is the source and lifeblood of judicial power in the Federation.

[463] Question 3 reflects the underlying basis for this court's obiter observations in *Semenyih Jaya* and *Indira Gandhi* — that judicial power had been 'removed' by the 1988 amendment to art 121(1) of the Federal Constitution and that such removal of judicial power impinges on the doctrine of separation of powers and consequently any law passed by Parliament that ousts or circumscribes judicial power is void. One such law is s 59A of the Immigration Act, which ousts the power of the High Courts to judicially review the substantive decision of the decision maker, in this case the decision by the Director General of Immigration to impose the travel ban on the appellant.

[464] On the face of it, the observations in the two cases appear to give the impression that being in breach of the doctrine of separation of powers, art 121(1) of the Federal Constitution is unconstitutional and has no force of law to confer on Parliament the power to enact ouster clauses such as s 59A of the Immigration Act.

[465] The decisions could be misinterpreted to mean that art 121(1) of the Federal Constitution must bow to the doctrine of separation of powers. That could not have been what this court intended to say in the two cases. The doctrine of separation of powers simply means that the Legislature, the executive and the Judiciary do not intrude into each other's spheres of power — the Legislature makes the law, the executive enforces the law and the Judiciary interprets the law.

[466] What the doctrine prohibits is for the Legislature to enforce the law that it makes, for the executive to interpret the law that it enforces, and for the Judiciary to rewrite the law that it interprets. That, in essence, is what the doctrine of separation of powers is all about. Whatever may be the extent of power that the law confers on the three arms of government, the doctrine cannot be invoked to encroach into the imperatives of the Federal Constitution. Being the supreme law of the land, all three arms of government must adhere to its mandates, and this includes to empower Parliament through art 121(1) to enact federal laws on the limits of judicial power.

SECTION 59A OF THE IMMIGRATION ACT

[467] Section 59A of the Immigration Act is couched in the following language:

> 59A (1) There shall be no judicial review in any court on any act done or any decision made by the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, under this Act except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision.
>
> (2) In this section, 'judicial review' includes proceedings instituted by way of —
>
> (a) an application for any of the prerogative orders of mandamus, prohibition and certiorari;
>
> (b) an application for a declaration or an injunction;
>
> (c) any writ of habeas corpus; or
>
> (d) any other suit or action relating to or arising out of any act done or any decision made in pursuance of any power conferred upon the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, by any provisions of this Act.

[468] The section is presumed by law to be constitutionally valid and the burden of proof is on whoever alleges otherwise, with the qualification that the presumption is not to be stretched for the purpose of validating an otherwise invalid law: see *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116; [1976] 1 LNS 180.

[469] Courts try to sustain the validity of an impugned law to the extent that is possible, and will only strike down a law when it is not possible to do so: see *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128; *Ooi Kean Thong & Anor v Public Prosecutor* [2006] 3 MLJ 389; [2006] 2 CLJ 701; *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289; [2005] 4 CLJ 169; *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277; [2020] 8 CLJ 147 (*Letitia Bosman*).

[470] Being a post-Merdeka law, s 59A of the Immigration Act is subject to art 4(1) of the Federal Constitution, which established constitutional supremacy in Malaysia. The artiucle reads:

> This Constitution is the supreme law of the Federation and any law passed after Merdeka Day *which is inconsistent with this Constitution* shall, to the extent of the inconsistency, be void. (Emphasis added.)

[471] To be inconsistent with 'this Constitution' means to be inconsistent with any article of the Federal Constitution that relates to the legislative scheme of the impugned law. In the present case, the legislative scheme of s 59A of the Immigration Act is to limit the judicial review power of the High Courts to procedural non-compliance by the decision maker. Clearly that is within the competence of Parliament to legislate pursuant to the power conferred on it by art 121(1) of the Federal Constitution. The section is therefore not void under art 4(1) for being inconsistent with art 121(1).

[472] The purport of s 59A of the Immigration Act is merely to limit judicial power and is not a finality clause. This court in *Semenyih Jaya* had this to say on finality clauses:

> Therefore, even if an administrative decision is declared to be final by a governing statute, an aggrieved party is not barred from resorting to the supervisory jurisdiction of the court. The existence of a finality clause merely bars an appeal to be filed by an aggrieved party.

[473] What is not amenable to judicial review under s 59A of the Immigration Act is only the decision that the decision maker makes. Procedural non-compliance is still amenable to judicial review.

[474] Ouster clauses are not an uncommon feature in our statute books. They are even found in the Federal Constitution itself. A good example is Item 2 Part III of the Second Schedule which provides:

> 2. A decision of the Federal Government under Part III of this Constitution shall not be the subject of appeal or review in any court.

[475] The key question for this court's determination in relation to question 3 is whether legal remedy in the form of judicial review can be limited in its scope by an Act of Parliament, in this case by s 59A of the Immigration Act, which limits the legal challenge to procedural non-compliance.

[476] The main thrust of the appellant's argument is that by limiting the court's judicial review power to procedural non-compliance and denying it of

the power to review the substantive decision itself, Parliament is in breach of the doctrine of separation of powers, which is a 'basic structure' of the Federal Constitution.

[477] The questions that must follow are:

(a) under the doctrine of separation of powers, does the court enjoy unlimited jurisdiction and unbridled powers when it comes to enforcement of rights by way of judicial review?

(b) is art 121(1) of the Federal Constitution, under which s 59A of the Immigration Act is enacted, unconstitutional and therefore void for violating the doctrine of separation of powers? and

(c) is there no limit to judicial power, in the sense that not even the Federal Constitution can confer power on the legislative arm of government to legislate on the jurisdiction and powers of the courts?

[478] The appellant's contention is that being an ouster clause, s 59A of the Immigration Act is unconstitutional and has 'no leg to stand on' in the light of the following trinity of cases: *Semenyih Jaya*; *Indira Gandhi*; and *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780 (*Alma Nudo Atenza*).

[479] According to learned counsel, these cases identified judicial review as a constitutional imperative operationalising the rule of law underpinning of the Federal Constitution and its concomitant, the separation of powers and that these two concepts taken together were declared as the 'basic structure' of the Federal Constitution, sacrosanct and inviolable and not amenable to amendment by recourse to art 159 of the Federal Constitution.

[480] It was submitted that these decisions established general principles as to the power of the courts under art 121(1) of the Federal Constitution and that the principles cut across the specific factual matrix and subject matter of the cases and cannot be limited to their factual context such as land law and the like.

[481] The common thread among all three cases is 'basic structure' of the Federal Constitution, which presumably is a reference to the doctrine of separation of powers housed in art 121(1) of the Federal Constitution. The article provides as follows:

> (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely —

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed),

and such inferior courts as may be provided by federal law and *the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law*. (Emphasis added.)

[482] The first thing to note with regard to this article is that it is the constitutional provision that established the High Court of Malaya and the High Court of Sabah and Sarawak. Secondly, and very importantly, it provides, in explicit terms, that 'the jurisdiction and powers of the High Courts and inferior courts are as may be conferred by or under federal law'. These are carefully chosen words which are intended to mean what they say and say what they mean, and that is, Parliament may by legislation determine the jurisdictional boundaries of judicial power.

[483] The combined effect of *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza* on 'judicial power' was compendiously summarised by this court in *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561; [2019] 5 CLJ 569 as follows through Mohd Zawawi Salleh FCJ who delivered the majority decision (5–2) of the court:

(a) judicial power is vested exclusively in the High Courts by virtue of art 121(1) of the Federal Constitution. Judicial independence and separation of powers are recognised as 'basic features' in the basic structure of the Federal Constitution. The inherent judicial power of the civil courts under art 121(1) is inextricably intertwined with their constitutional role as a check and balance mechanism (*Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza*);

(b) Parliament does not have power to amend the Federal Constitution to the effect of undermining the doctrine of separation of powers and independence of the Judiciary, which formed the 'basic structure' of the Federal Constitution (*Semenyih Jaya*); features of the basic structure cannot be abrogated or removed by a constitutional amendment (*Indira Gandhi*);

(c) courts can prevent Parliament from destroying the basic structure of the Federal Constitution. And while the Federal Constitution does not

specifically explicate the doctrine of basic structure, what the doctrine signifies is that a parliamentary enactment is open to scrutiny not only for clear-cut violation of the Federal Constitution but also for violation of the documents or principles that constitute the constitutional foundation (*Alma Nudo Atenza*);

(d) a constitution must be interpreted in the light of its historical and philosophical context, as well as its fundamental underlying principles; the foundational principles of a constitution shape its basic structure (*Indira Gandhi*); and

(e) judicial power cannot be removed from the Judiciary; judicial power cannot be conferred upon any other body which does not comply with the constitutional safeguards to ensure its independence; non-judicial power cannot be conferred by another branch of government onto the Judiciary (*Semenyih Jaya*).

Sugumar Balakrishnan

[484] In relation to s 59A of the Immigration Act, the decisions in *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza* appear to be in conflict with the earlier decision of this court in *Sugumar Balakrishnan* which held that the section excludes judicial review on the substantive decision of the authority. The case also endorsed the validity of s 59 of the Immigration Act (relevant to leave question 2) which excludes the right of hearing. The section reads as follows:

> 59. No person and no member of a class of person shall be given an opportunity of being heard before the minister or the Director General, or in the case of an East Malaysian State, the State Authority, makes any order against him in respect of any matter under this Act or any subsidiary legislation made under this Act.

[485] These are the same provisions of the Immigration Act that are being impugned in the present appeal. At the Court of Appeal stage of *Sugumar Balakrishnan* (*Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289), Gopal Sri Ram JCA (as he then was) who wrote the judgment of the court applied the 'substantive fairness' test to hold that the second respondent's decision to direct a cancellation of the appellant's Entry Permit into the State of Sabah was null and void. Amongst others, the learned judge observed as follows:

(a) judicial review is a 'basic and essential feature' of the Federal Constitution and, excepting cases involving national security or national interest to which special consideration would apply, no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. Section 59A of the Immigration Act therefore cannot and does not preclude the High Court from exercising its powers of

judicial review to examine the validity of the exercise of administrative powers conferred by the Act both on substantive as well as procedural grounds. An ouster clause in a statute, in any case, immunises from judicial review only those administrative acts and decisions that are not infected by an error of law; and

(b) like the expression 'life' in art 5(1) of the Federal Constitution, which must receive a broad and liberal interpretation, the words 'personal liberty' in art 5(1) must similarly be interpreted. It follows that the liberty of an aggrieved person to go to court and seek relief, including judicial review of administrative action, is one of the many facets of the personal liberty guaranteed by art 8 of the Federal Constitution.

[486] The decision was reversed on appeal by this court. Mohd Dzaiddin FCJ (as he then was) who delivered the unanimous decision of the court gave the following reasons for overruling the decision:

> Here, on a clear wording of s 59A, in our view, Parliament must have intended to conclusively exclude judicial review except on procedural defect under the Act or regulations made thereunder. In the words of Viscount Simonds in *Pyx Granite Co Ltd v Ministry of Housing and Local Government & Ors* [1960] AC 260 at p 286:
>
> > It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words.
>
> Our answer to Question No 1 is therefore that *the combined effect of the exclusion of right to be heard provided in s 59 of the said Act and the ouster clause provided in s 59A thereof has excluded review in respect of the direction given by the State Authority under s 65(1)(c) on any ground except in regard to any question relating to compliance with any procedural requirement of the Act or regulations made thereunder governing that act or decision*. (Emphasis added.)

[487] Before us however, it was argued that *Sugumar Balakrishnan* was 'wrongly decided' by this court and should be overruled, for the following reasons:

(a) the statement that judicial review can be excluded by express words in an Act of Parliament flies in the face of *Semenyih Jaya* and *Indira Gandhi*;

(b) its rejection of the substantive ground of jurisdiction in judicial review cases established in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 (*R Rama Chandran*) is manifestly erroneous;

(c) the case was decided per incuriam as it ignored a plethora of cases of high authority which established beyond peradventure that even widely worded ouster clauses cannot exclude judicial review. In particular it ignored the decision in *Che Ani bin Itam v Public Prosecutor* [1984] 1

MLJ 113; [1984] 1 CLJ 72 and *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64; [1980] 1 LNS 181. In the upshot, *Sugumar Balakrishnan* has no binding effect as a precedent; and

(d) the decision bucks high authority established post-*Sugumar Balakrishnan*, namely *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* [2008] 4 MLJ 641; [2008] 5 CLJ 321 (*Petrojasa*); *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507 (*Sivarasa Rasiah*); *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza*.

[488] It was submitted that accepting *Sugumar Balakrishnan* will:

(a) restore a position that has been rejected by high judicial authority which repudiated ouster clauses and which were cited with approval by this court in *Indira Gandhi* and *Alma Nudo Atenza*;

(b) roll back on the development of the law on judicial review as the post *Sugumar Balakrishnan* decisions demonstrate; and

(c) undermine the constitutional dimension of judicial review as a critical pillar of the basic structure of the Federal Constitution.

[489] The long and short of the argument is that *Sugumar Balakrishnan* is outdated and must be replaced with *Semenyih Jaya* and *Indira Gandhi* and that the Court of Appeal version of *Sugumar Balakrishnan* must be restored and affirmed by this court. The appellant's discordant with *Sugumar Balakrishnan* is that giving the court review powers only on the 'extremely narrow ground' of procedural non-compliance curtails the power of judicial review, which 'runs foul' of the decisions in *Semenyih Jaya* and *Indira Gandhi*. Reference was made to the observation by Lord Steyn in *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539 at p 591 where the learned law Lord said:

> The rule of law enforces minimum standards of fairness, both substantive and procedural.

[490] It was thus urged upon us that it is 'about time' this court departs from *Sugumar Balakrishnan* and to continue with the recent trend of decisions that safeguard the sanctity of judicial review as 'part of' the basic structure of the Federal Constitution, particularly now in the Immigration Act. From the appellant's point of view therefore, *Sugumar Balakrishnan* stands in her way and must be taken out of the way.

[491] The appellant's reliance on *R Rama Chandran* was for the proposition that courts have the power to 'scrutinize such decisions not only for process,

but also for substance'. The upshot according to learned counsel is that judicial review cannot be ousted in its procedural and substantive aspects as its 'all-encompassing reach' is now firmly entrenched in our administrative and constitutional jurisprudence.

[492] I shall deal with the arguments right away, not necessarily in the order that learned counsel presented his case. First, the contention that *Sugumar Balakrishnan* was decided per incuriam and therefore has no binding effect. The contention is untenable. In *Morelle Ltd v Wakeling* [1955] 1 All ER 708 Sir Raymond Evershed MR said this of the concept of per incuriam at p 718:

> We have been unable to accept this argument. As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given *in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned*: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene, MR, of the rarest occurrence. (Emphasis added.)

[493] In another Court of Appeal case, *Duke v Reliance Systems Ltd* [1987] 2 WLR 1225, Sir John Donaldson MR said at p 1228:

> I have always understood that the doctrine of per incuriam only applies where another division of this court has reached a decision in the absence of knowledge of a decision binding upon it or a statute, and that in either case it has to be shown that, had the court had this material, it must have reached a contrary decision. That is per incuriam. I do not understand the doctrine to extend to a case where, if different arguments had been placed before it, it might have reached a different conclusion. That appears to me to be the position at which we have arrived today.

[494] Our courts have accepted the proposition of law enunciated in these cases on the notion of per incuriam: see for example *Megah Teknik Sdn Bhd v Miracle Resources Sdn Bhd* [2010] 4 MLJ 651; [2010] 6 CLJ 745 and *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590; [2017] 4 CLJ 265.

[495] Having regard to the principles laid down in these cases, I am unable to accept the appellant's argument that *Sugumar Balakrishnan* was decided per incuriam. First of all, being a decision of the apex court, it is not subject to the stare decisis rule. It was therefore wrong for counsel to say that it has no binding effect as a precedent on the ground that 'it ignored a plethora of cases of high authority which established beyond peradventure that even widely worded ouster clauses cannot exclude judicial review'. Secondly and more importantly,

it was not a decision that was reached 'in the absence of knowledge of a decision binding upon it or a statute, and that in either case it has to be shown that, had the court had this material, it must have reached a contrary decision' (*Reliance Systems Ltd*).

[496] The ratio decidendi of *Sugumar Balakrishnan* is that natural justice can be excluded by the clear words of s 59 and judicial review by the clear words of s 59A of the Immigration Act. There is nothing fundamentally or manifestly wrong with that as ss 59 and 59A of the Immigration Act were there in the statute book to the knowledge of the panel hearing the case.

[497] It was purely a matter of interpretation. This court cannot overrule *Sugumar Balakrishnan* based on the per incuriam rule just because it would have been decided differently if argued differently. As Sir John Donaldson MR went on to say in *Reliance Systems Ltd*:

> I do not understand the doctrine to extend to a case where, if different arguments had been placed before it, it might have reached a different conclusion. That appears to me to be the position at which we have arrived today.

[498] As for the argument that judicial review cannot be ousted in its procedural and substantive aspects as its 'all-encompassing reach' is now firmly entrenched in our administrative and constitutional jurisprudence, that is not entirely correct because Edgar Joseph Jr FCJ in *R Rama Chandran* also noted that the extent of judicial review may be determined by legislative intervention. This is what the learned judge said:

> To recapitulate, I had at the outset observed that supervisory review jurisdiction is a creature of the common law and is available in the exercise of the courts' inherent power but *its extent may be determined not merely by judicial development but also by legislative intervention*. (Emphasis added.)

[499] Next, the submission that 'an abundance' of this court's decisions post-*Sugumar Balakrishnan* shows that s 59A of the Immigration Act is no longer good law and that the present judicial trend provides that access to justice is a fundamental right and that judicial review is an integral facet of the doctrine of separation of powers which is a 'basic feature' of the Federal Constitution.

[500] For this proposition, we were referred, amongst others, to the three decisions of this court in (1) *Petrojasa*; (2) *YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener)* [2009] 4 MLJ 24; and (3) *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; [2010] 3 CLJ 507 (*Sivarasa Rasiah*). Particular emphasis was placed on the following observation by Arifin Zakaria FCJ (as he

then was) in his supporting judgment in *Petrojasa*:

> The position now is that the courts in the Commonwealth, Malaysia including, have moved away from the traditionalist approach that the Crown can do no wrong. Therefore, the courts in the Commonwealth jurisdictions generally have held that the executive arms of the Government is amenable to the judicial review proceedings.

[501] In addition to the three local authorities, we were also referred to the Indian Supreme Court case of *Anita Kushwaha v Pushap Sudan* AIR 2016 SC 3506 where, in summing up, the court, inter alia, said:

> 26. To sum up: Access to justice is and has been recognized as a part and parcel of right to life in India and in all civilized societies around the globe. The right is so basic and inalienable that no system of governance can possibly ignore its significance, leave alone afford to deny the same to citizens.

[502] Given the fact that our system of government subscribes to the rule of law, there can be no issue with *Petrojasa*'s observation that the courts have moved away from the traditionalist approach that the government can do no wrong. Indeed, government decisions have been quashed or declared invalid by our courts on many occasions before and there is a good chance that that will continue to be the case.

[503] The observation by Arifin Zakaria FCJ in *Petrojasa* must be understood in the context it was made. In that case, the question before this court was whether judicial review proceedings may be taken against the appellants, the Minister of Finance and the Government of Sabah, to compel payment of the judgment sum as certified in the certificate issued under s 33(3) of the Government Proceedings Act 1956.

[504] The appellants had contended that judicial review did not lie against them to enforce payment of a judgment sum for to allow such an application would tantamount to allowing enforcement proceedings to be taken against the State Government through the back door. The argument was rejected. Clearly, the issue in that case was whether the Minister of Finance and the State Government of Sabah could with impunity refuse to comply with a valid court order.

[505] *Sugumar Balakrishnan*, on the other hand, was decided on a completely different legal basis, which was whether s 59A of the Immigration Act is valid law. It concerned the power of the Legislature to make law, unlike *Petrojasa* which was concerned with the question whether judicial review could lie against the government. Given the divergent factual matrix between the two cases, the appellant's reliance on *Petrojasa* is misconceived.

[506] Last but not least, counsel's contention that *Sugumar Balakrishnan* 'flies in the face' of *Semenyih Jaya* and *Indira Gandhi* by deciding that judicial review can be excluded by express words in an Act of Parliament. A

[507] To begin with, both *Semenyih Jaya* and *Indira Gandhi* were not cases on s 59A of the Immigration Act whereas *Sugumar Balakrishnan* was. That probably explains why no mention at all was made of *Sugumar Balakrishnan* in the two cases. Neither was it referred to in *Alma Nudo Atenza*, the other case that the appellant relied on, maybe for the same reason as well. B

[508] In *Semenyih Jaya*, the constitutional questions for this court's determination were: C

(a) whether s 40D(3) and the proviso to s 49(1) of the Land Acquisition Act 1960 were ultra vires art 121(1B) of the Federal Constitution particularly when read in the context of art 13; and D

(b) whether s 40D(1) and (2) of the Land Acquisition Act 1960 were ultra vires art 121 of the Federal Constitution read in the context of art 13.

[509] As for *Indira Gandhi*, the questions for determination were: E

(a) whether the High Court had the exclusive jurisdiction pursuant to ss 23, 24 and 25 and the Schedule to the Courts of Judicature Act 1964 (read together with O 53 of the Rules of Court) and/or its inherent jurisdiction) to review the actions of the Registrar of Muallafs or his delegate acting as public authorities in exercising statutory powers vested by the Perak Enactment; F

(b) whether a child of a marriage under the Law Reform (Marriage and Divorce) Act 1976 (a civil marriage) who had not attained the age of 18 years must comply with both ss 96(1) and 106(b) of the Perak Enactment before the Registrar of Muallafs or his delegate may register the conversion to Islam of that child; and G

(c) whether the mother and the father (if both are still surviving) of a child of a civil marriage must consent before a certificate of conversion to Islam could be issued in respect of that child. H

[510] As can be seen, not only are the facts in *Semenyih Jaya* and *Indira Gandhi* different from the facts in *Sugumar Balakrishnan*, but the constitutional and/or legal issues raised were also different. Therefore, the question of *Sugumar Balakrishnan* 'flying in the face' of *Semenyih Jaya* and *Indira Gandhi* does not arise at all although the two cases appear to have 'overruled' *Sugumar Balakrishnan* on the broad ground that Parliament cannot remove judicial power from the courts and consigning it to non-judicial bodies, in breach of the doctrine of separation of powers. I

[511] The same goes with *Alma Nudo Atenza*, a case on the constitutionality of s 37A of the Dangerous Drugs Act 1952. It was not a case on the constitutionality of ouster clauses although there are passages in the judgment that give the impression that Parliament has no power to destroy the 'basic structure' of the Federal Constitution and that the courts can prevent that from happening. *Sugumar Balakrishnan* is therefore the prevailing authority on the constitutional validity of ss 59 and 59A of the Immigration Act and not *Semenyih Jaya*, *Indira Gandhi* or *Alma Nudo Atenza*.

[512] It is a principle of great antiquity that the decision in each case must be confined to its own peculiar facts and circumstances. It is not every pronouncement by the court that counts as the ratio decidendi of the case. While obiter dicta are entitled to due respect, they cannot be placed on par with ratio decidendi. Care must be taken to separate the wheat from the chaff so to speak.

ARTICLE 4(1) OF THE FEDERAL CONSTITUTION

[513] There is no dispute that s 59A of the Immigration Act was enacted pursuant to art 121(1) of the Federal Constitution. It is this article and not any other article that vests judicial power of the Federation in the courts. Section 59A of the Immigration Act was not, it will be noted, enacted pursuant to any other article of the Federal Constitution which it could be inconsistent with and therefore void under art 4(1).

[514] It is important to bear this in mind because the appellant seems to be making the argument that s 59A of the Immigration Act is void not because it is inconsistent with art 121(1) but because it is inconsistent with some other articles of the Federal Constitution, namely art 5(1) — right to life and personal liberty, art 8(1) — equality before the law and art 10(1) — right to free speech and expression. This is clear from the reliefs that the appellant prayed for in the High Court, amongst which was for a declaration that the decision by the Director General of Immigration to ban her from travelling overseas was unconstitutional and therefore void for breaching these three articles of the Federal Constitution.

[515] With due respect, these articles have no relevance whatsoever to the issue before the court, which is whether Parliament is vested with power by art 121(1) of the Federal Constitution to enact s 59A of the Immigration Act. The answer to this question depends on whether Parliament had acted within the constitutional framework of art 121(1) when it enacted the section and not whether the section is void for being inconsistent with arts 5(1), 8(1) or 10(1) of the Federal Constitution.

[516] Even if, for the sake of argument, that the constitutionality of s 59A of the Immigration Act can be linked to art 5(1) of the Federal Constitution (right to life and personal liberty) the appellant has no valid claim in any event to a right to travel overseas: see *Loh Wai Kong*. Furthermore, this line of argument is a complete deviation from the issue raised in question 3 of the leave question, which is whether s 59A of the Immigration Act is valid and constitutional in the light of *Semenyih Jaya* and *Indira Gandhi*. There is no reference at all in leave question 3 to arts 5(1), 8(1) and 10(1) of the Federal Constitution.

[517] The issue that this court is concerned with is the power of Parliament to make law, which has nothing to do with the right to life and personal liberty, the right to equality before the law and the right to freedom of speech and expression. To bring into the equation articles of the Federal Constitution which have nothing to do with the power of Parliament to make law is to divert attention away from the real issue before the court. Clearly, the enactment of s 59A of the Immigration Act by Parliament is sanctioned by art 121(1) of the Federal Constitution, thus making it a valid ouster clause. A valid ouster clause cannot be struck down under art 4(1). As noted by Edgar Joseph Jr FCJ in *R Rama Chandran*, the extent of judicial review may be determined by legislative intervention.

[518] Article 4(1) of the Federal Constitution is not intended to operate the way the appellant suggests it should operate. The article is there to safeguard the supremacy of the Federal Constitution by preventing Parliament from passing any law it pleases and the provision only comes into play where there is inconsistency between any post-Merdeka law and the Federal Constitution and the inconsistency is irreconcilable with the terms of the relevant articles of the Federal Constitution. Article 4(1) has nothing to do with judicial power of the Federation. The judicial power of the Federation is governed by art 121(1) and not by arts 4(1), 5(1), 8(1), 10(1) or any other article.

[519] The way art 4(1) of the Federal Constitution works in relation to s 59A of the Immigration Act is to render the provision void if and only if it is inconsistent with any constitutional provision that confers it with the legitimacy and force of law. It is only art 121(1) of the Federal Constitution that confers such legitimacy and force of law on s 59A of the Immigration Act and no other article. For that reason, s 59A of the Immigration Act can only be void if it is inconsistent with art 121(1) and not with any other article of the Federal Constitution such as arts 5(1), 8(1), and 10(1) which have nothing to do with the power of Parliament to enact federal law pursuant to art 121(1) of the Federal Constitution.

[520] It will be a strange working of the law if s 59A of the Immigration Act is to be struck down under art 4(1) for being inconsistent with these other

articles of the Federal Constitution when it is not inconsistent with the article that gives it the legitimacy and force of law. The proposition is as good as saying that art 121(1) has no constitutional force of law and incapable of vesting power in Parliament to enact s 59A of the Immigration Act. The proposition is clearly unsustainable and must be rejected.

[521] Article 4(1) cannot be invoked to strike down just any post-Merdeka law that is inconsistent with just any article of the Federal Constitution. The article that the post-Merdeka law is inconsistent with must relate to the relevant subject matter and legislative scheme of the impugned law if the law is to be declared void under art 4(1). To illustrate the point, a law passed by Parliament that is inconsistent with the right to life and personal liberty under art 5(1) cannot be declared void under art 4(1) for being inconsistent with the right to free speech and freedom of expression under art 10(1). If at all it must be declared void, it is to be declared void under art 4(1) for being inconsistent with art 5(1) and not with art 10(1). That, of course, is to state the obvious. In the present appeal, the appellant's complaint really is about her right to travel under art 5(1) but she has conflated the issue with an alleged breach of her right to freedom of expression under art 10(1).

[522] Likewise, art 4(1) cannot be invoked to strike down any law that is inconsistent with itself as the article does not operate by itself and on its own. It must be read in conjunction with any other relevant article of the Federal Constitution. Thus, if at all s 59A of the Immigration Act is to be declared void, it is void not because it is inconsistent with art 4(1) but because it is inconsistent with art 121(1).

[523] It must be appreciated that art 4(1) only operates as a mechanism to declare any post-Merdeka law void for being inconsistent with any other relevant article of the Federal Constitution. The second part of art 4(1) requires it to be read in conjunction with any other article of the Federal Constitution before it can take effect. It does not operate by itself and on its own.

IRRESISTIBLE CLEARNESS OF PARLIAMENT'S INTENTION

[524] As mentioned, the source of judicial power in the Federation is art 121(1) of the Federal Constitution and not any other article. Without art 121(1), the courts would have no judicial power to exercise, not even the limited power conferred by s 59A of the Immigration Act. The other articles do not confer judicial power on the Judiciary. They deal with different fundamental aspects of our everyday life.

[525] The expression 'the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law' used in art

121(1) is irresistibly clear and unambiguous and admits of no other interpretation. It will not offend any canon of constitutional interpretation if it is given a literal interpretation.

[526] In the context of the present case, the question is not whether art 121(1) is or is not a 'basic structure' of the Federal Constitution. Whatever the label, art 121(1) is the governing provision on judicial power of the Federation. The proper question to ask in relation to 'judicial power' of the Federation is, what are the terms of art 121(1) of the Federal Constitution?

[527] In *Liyanage v R* [1967] 1 AC 259 the Privy Council observed, inter alia, that powers in countries with written constitutions must be exercised in accordance with the terms of the constitution from which the powers were derived but of course no validity should be given to acts which infringe the constitution. Section 59A of the Immigration Act must be read in that light and in that spirit.

[528] Clearly, it is a term of art 121(1) of the Federal Constitution that the jurisdiction and powers of the courts are 'as may be conferred by or under federal law'. In the context of the present case, that 'federal law' is s 59A of the Immigration Act. Thus, federal law has determined that the jurisdiction and powers of both High Courts in immigration matters are only to adjudicate on procedural non-compliance and not on the substantive decision of the decision maker. Both the High Court of Malaya and the High Court of Sabah and Sarawak have no jurisdiction to travel outside the confines of that power.

[529] For the two High Courts to ignore the limitations imposed by s 59A of the Immigration Act in the name of separation of powers and judicial independence is to defy art 121(1) of the Federal Constitution, which the two High Courts are not at liberty to do. Salleh Abas LP in *Lim Kit Siang v Dato Seri Dr Mahathir Mohamad* [1987] 1 MLJ 383; [1987] 1 CLJ 40; [1987] CLJ Rep 168 once said:

> The courts have a constitutional function to perform and they are *the guardian of the constitution within the terms and structure of the Constitution itself*; they not only have the power of construction and interpretation of legislation but also the power of judicial review - a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but of the Constitution over both. The courts are the final arbiter between the individual and the state and between individuals inter se, *and in performing their constitutional role they must of necessity and strictly in accordance with the constitution* and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action. (Emphasis added.)

[530] Given the clear language of s 59A of the Immigration Act and on the

strength of the supporting authorities cited by the respondents, including *Sugumar Balakrishnan*, I accept the following arguments by the learned senior federal counsel as stating the correct position of the law:

(a) Parliament can depart from the general law or fundamental principles such as natural justice by expressing its intention with irresistible clearness: *R v Secretary of State for the Home Department; ex parte Simms* [2000] 2 AC 115; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252. Rules of natural justice regulating the exercise of statutory power may be excluded by plain words of necessary intendments: *Annetts v McCann* (1990) 170 CLR 596; (1990) 97 ALR 177. Courts are generally willing to find evidence of the intended exclusion of natural justice: *Brettingham-Moore v Municipality of St Leonards* (1969) 121 CLR 509; *Pearlberg v Varty (Inspector of Taxes)* [1972] 1 WLR 534; [1972] 2 All ER 6; *Paul Furnell v Whangarei High School Board* [1973] AC 660; and

(b) to ascertain whether the plain words of a statute connote the necessary intendment, it is only necessary to pay close attention to the relevant statute: *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152; *Kioa v West; sub nom Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550. The conferral of an unconditional discretionary power to a public authority suggests that natural justice is not intended to apply: *Salemi v MacKellar (No 2)* (1977) 137 CLR 396.

[531] Section 59A of the Immigration Act has expressed with irresistible clearness the intention of Parliament to exclude judicial review on the decision made by the Minister, the Director General, and, in the case of Sabah and Sarawak, the state authority.

[532] The recent decision of the UK Supreme Court in *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22, SC (*Privacy International*) drives home the point in the clearest of terms. One of the questions posed for the determination of the court in that case was whether Parliament might by statute 'oust' the supervisory jurisdiction of the High Court to quash the decision of an inferior court or statutory tribunal of limited jurisdiction, a question that is similar in pith and substance to the question posed in relation to s 59A of the Immigration Act. It was decided by majority (Lord Carnwath, Lady Hale and Lord Kerr) that:

> ... *Judicial review can only be excluded by 'the most clear and explicit words'* (*Cart*, para 31). If Parliament has failed to make its intention sufficiently clear, it is not for us to stretch the words used beyond their natural meaning. It may well be that the promoters of the 1985 Act thought that their formula would be enough to provide

comprehensive protection from jurisdictional review of any kind. (Emphasis added.)

[533] There is no other way of reading this part of the judgment other than to ascribe to it what it means to say, which is Parliament can exclude judicial review by using clear unequivocal language in the statute. It was a reaffirmation of the principle laid down in *Pyx Granite Co Ltd v Ministry of Housing and Local Government & Ors* [1960] AC 260 where Viscount Simonds said at p 286:

> It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded *except by clear words*. (Emphasis added.)

[534] The decision of the UK apex court in *Privacy International* shows that even in a country where Parliament is supreme, judicial review can still be excluded by an Act of Parliament and the court will uphold such law provided it is drafted in clear and explicit language.

[535] Post-*Sugumar Balakrishnan*, this was also the position taken by this court in *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81 where at p 93 the court said that judicial review which is essentially a creature of common law can be excluded by statutory legislation if the words used are unmistakably explicit. At p 95, this is what Steve Shim CJ (Sabah and Sarawak) delivering the judgment of the court said:

> Given the established authorities referred to, it cannot be said that the Federal Court in *Sugumar Balakrishnan* has broken any new ground in determining the extent and scope of ouster clauses. There is no paradigm shift. It has followed entrenched principles which can effectively be summed up as follows: that an ouster clause may be effective in ousting the court's review jurisdiction if that is the clear effect that Parliament intended; *that if the intention of Parliament is expressed in words which are clear and explicit, then the court must give expression to that intention*. Clearly, the intention of Parliament is to be garnered from the wordings of the ouster clause. (Emphasis added.)

[536] In the circumstances I reject counsel's contention that *Sugumar Balakrishnan* was wrong in holding that judicial review can be excluded by express words in an Act of Parliament, in this case by the express words in s 59A of the Immigration Act. It is rather unfortunate that *Semenyih Jaya* and *Indira Gandhi* were not considered from this perspective, which both *Sugumar Balakrishnan* and *Nasharuddin Nasir* appropriately did.

CONSTITUTIONAL INTERPRETATION

[537] One of the canons of constitutional interpretation is that the constitution must be interpreted in the light of its historical and philosophical

context. This was acknowledged by *Indira Gandhi*. But as correctly pointed out by the learned senior federal counsel, *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza* were decided without the benefit of the historical records during the drafting stage of the Federal Constitution. Our attention was drawn to the relevant records and minutes, which reveal the following salient facts in relation to 'judicial power' of the Federation:

(a) the Alliance Party expressed in their memorandum to the Reid Constitutional Commission ('the Reid Commission') that the Judiciary should be completely independent both of the Executive and the Legislature; that the fountain of all justice should be the Yang di-Pertuan Besar; that there should be, besides the subordinate courts, a High Court with appeals therefrom to the Supreme Court; that the Supreme Court should also be vested with powers to decide whether or not the actions of both the Federal Executives and Legislatures were in accordance with the Constitution;

(b) during the hearing of the Alliance Party held on 27 September 1956, Dato' Abdul Razak confirmed that it shall be open to challenge as ultra vires actions of both the Federal as well as State Executive and Legislatures, including other administrative instructions;

(c) in the list of the main heads of the subjects to be included in the Draft Constitution prepared by Justice Abdul Hamid under 'Judiciary', item 59 provided for the Supreme Court, item 60 spelled out the powers and jurisdiction of the Supreme Court, while items 61 and 62 listed out respectively the composition, powers and jurisdiction of the High Court;

(d) in the 53rd Reid Commission Meeting of 15 October 1956, items 59–62 were discussed and it was agreed that there should be a Supreme Court for the Federation and that instead of having a separate provision for the setting up of the High Court and its powers and jurisdiction, it is a matter reserved for Parliament to decide in the future whether or not to create a High Court. In the result, items 61 and 62 were omitted from the draft Constitution;

(e) in the same meeting, it was agreed by the Commissioner that the power and jurisdiction of the Supreme Court should be continued as at present (then) and the Supreme Court should have power to interpret the provisions of the Constitution. The Commissioner further agreed that any further appellate or revisional jurisdiction of the Supreme Court should be a matter for Parliament to decide by way of an Act of Parliament conferring the authority for the making of the necessary rules of court;

(f) in the Reid Commission Report, the Commission recognised that 'as the law now stands' the jurisdiction of all courts was within the legislative

powers of the Federation; and subject to the express terms of the Federation Agreement which provided for a Supreme Court consisting of a High Court and a Court of Appeal, *the powers of the Supreme Court were determined by federal law*. The Reid Commission did not see it necessary to propose any considerable changes in the arrangement. It recommended the continuance of the present (then) Supreme Court which retained the same powers and procedure. That was reflected in arts 114(4), 118, 119(2), 122, 123, 124(1) and (2) of the draft Constitution;

(g) the substantially same clauses agreed in the draft Constitution were translated into the Constitutional Proposals for the Federation of Malaya. For the first time, art 121 made mention of the vesting of judicial power of the Federation as being reposed in a Supreme Court and such inferior courts 'as may be provided by federal law';

(h) art 121 proposed in the White Paper was officially adopted in the Constitution of the Federation of Malaya;

(i) following the formation of Malaysia, the Malaysia Act (No 26 of 1963) amended art 121 of the 1957 Federal Constitution to establish three High Courts (para [1] of the Inter-Governmental Report). According to the Report of the Inter-Governmental Committee 1962 ('the IGC Report'), each of the High Courts should have unlimited original jurisdiction and such appellate and revisional jurisdiction 'as may be provided by federal law'; and

(j) the jurisdiction of the Supreme Court was narrowly confined to specific matters enumerated therein. Crucially, the IGC Report specifically reserved that provisions in the Federal Constitution establishing the High Court of the Borneo States, the appointment and removal of judges, and for the court's jurisdiction may not be repealed or amended without the concurrence of the governments of the Borneo States. The various recommendations pertaining to the Judiciary in the IGC Report were implemented by ss 13 and 14 of the Malaysia Act 1963, which among others, vested the judicial power of the Federation 'in the three High Courts of co-ordinate jurisdiction and status'.

[538] It is thus clear that based on the historical context of 'judicial power', vis art 121 set out above, it can be surmised as follows:

(a) first, it was the unmistakable intention of the Reid Commission that the jurisdiction, powers and procedures of the Supreme Court then obtaining should be continued in independent Malaya post-Merdeka. The 'basic structure' inherent in the judicial set up then was that *jurisdiction and powers conferred unto a court were matters purely within the legislative powers of the Federation*.

The scope and extent of such jurisdiction and powers of the courts, with the exception of the Supreme Court whose jurisdiction was expressly conferred by the principal instrument, were determined by federal law. This is evident in cll 14(1) and (3), and cl 15 of the Malayan Union Order in Council 1946. Identical arrangement was adopted and followed in cll 77(1), (2) and (5) of the Federation of Malaya Agreement 1948. This distinctive feature was consistently adopted and manifested in articles 114(4), 118, 119(2), 122, 123, 124(1) and (2) of the draft Constitution;

(b) second, *the conferral of court's jurisdiction and powers by federal law is so entrenched in our constitutional history*, so much so that it was accepted as an unquestionable fact by the Reid Commission. Acceptance of this fact was fortified by the insertion of cl 17 'Courts and Jurisdiction' in the division of various powers between the Federal and State governments during the drafting stage (the 41st Meeting of the Reid Commission on 5 October 1956).

(c) third, the Reid Commission did not consider this division of powers to be constitutionally offensive or contrary to the doctrine of separation of powers. In fact, the potential discordance between this arrangement and the doctrine of separation of powers was confronted during the drafting process. It was originally proposed by Sir Ivor Jennings for the tentative draft provisions on 'Fundamental Liberties'.

Chief to those proposed tentative provisions which are relevant for the present purpose were Article 1 'Rule of Law', Article 2 'Enforcement of the Rule of Law' and Article 3 'Liberties of the Person'. In the 'Comments on the Draft', Sir Ivor Jennings explained that the provision for enforcement by way of judicial review was meant to be extended to the whole Constitution and not merely to the Chapter on Fundamental Liberties.

These tentative provisions were discussed by the Reid Commission on 10 October 1956. Notably, the Commission recognised the principle of 'non-justiciability' and expressed their view that matters which were not enforceable in court should not be included. It was also rather clear on the part of the Reid Commission that preventive detention and Emergency provisions should be treated narrowly from the general remedies proposed in articles 2 and 3 for the enforcement of liberty of person.

The tentative provisions were drafted as 'Second Draft'. Some major changes were introduced in the Second Draft: Article 2(1)(b)(iii), 2(2), and 3(5)(b). The combined effect of these changes was that remedies for enforcement of rights were to be generally prescribed by federal law, and that those remedies may be tightened or cut back in special circumstances.

The redrafted article 2 was criticised at the Constitutional Commission Working Party stage. In the minutes of the Working Party, question was raised on the potential invalidation of an otherwise valid statutory ouster clause by Article 2 in the seemingly absolute terms it was then drafted. Constitutional experts in London were consulted on this issue. Ultimately, the Reid Commission removed the entire Article 2 and explained in the White Paper as follows:

> The Article proposed by the Commission on the subject of the enforcement of the rule of law was, however, found unsatisfactory and has been omitted on the ground that it is impractical to provide within the limits of the Constitution for all possible contingencies. *It is considered that sufficient remedies can best be provided by the ordinary law.* (Emphasis added.)

[539] The net effect of omitting the entire draft art 2 on enforcement of rights is obvious, that there is no 'guaranteed' 'constitutional right' to a perceived 'unhindered access' to a court of law seeking for 'full remedy'. *In other words*, *the type and extent of remedy available is a matter for the Legislature to decide*.

[540] The Reid Commission quite evidently did not consider the issue as having any adverse effect on judicial power. Instead, by deferring their resolution to 'ordinary law', it shows that the real issue is rather the enforcement aspect, i.e. limitation on available remedy to an aggrieved party. This is the context in which the limitation on the court's power of review under s 59A of the Immigration Act must be understood.

[541] In the result, *federal law may prescribe what the Legislature considers as 'sufficient remedy' to meet the demand of the circumstances*. The very act of prescribing a remedy by federal law, without more, does not amount to an act calculated to jeopardise the due exercise of judicial power.

[542] Given the foregoing, I agree with the learned Senior Federal Counsel that in summary what it comes to is this:

(a) ouster clauses are not per se constitutionally invalid. Properly understood, what is sought to be ousted is the availability of remedy for enforcement of rights, not the exercise of judicial power. Judicial power remains and will always remain with the Judiciary unless and until art 121(1) of the Federal Constitution is amended or repealed. In any case, it is inconceivable to think that in a democratic setting judicial power is reposed in any institution other than the Judiciary;

(b) entrenched practice of the court's jurisdiction and powers prescribed by federal law does not violate the doctrine of separation of powers; and

(c) limiting the scope and extent on available remedies for enforcement of rights by federal law does not impinge on judicial power.

[543] It is clear that based on the drafting history of the Federal Constitution:

(a) in as much as doctrines such as separation of powers, independence of the Judiciary, rule of law, parliamentary democracy and constitutional monarchy formed part of the basic structure of the Malaya Constitution of 1957, one cannot ignore the fact that conferral of court's jurisdiction and powers by federal law is also a cornerstone of the Federal Constitution. In other words, it is also its basic structure; and

(b) the historical antecedent underlying the provision on judicial power in art 121 is not seriously at variance with the reasoning pronounced by this court in *Semenyih Jaya*. In any event, there is, on the facts of the present case, no removal of judicial power or conferral of judicial power to a non-judicial branch (as in *Semenyih Jaya* and *JRI Resources*). In issue is rather the scope for enforcement of fundamental rights, the remedy which, according to the Reid Commission, should be governed by 'ordinary law'.

AMENDMENTS TO THE FEDERAL CONSTITUTION

[544] Historically, the 'basic structure' (to use the term in the sense it was used in *Sivarasa Rasiah*, *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza*) of the Federal Constitution had undergone the process of amendment more than once before. It may be argued that the Malaysia Act (No 26 of 1963) which amended art 121 of the 1957 Federal Constitution to establish and vest judicial power in three High Courts (Malaya, Borneo States and Singapore) is such an amendment when it altered the structure of the courts under the 1957 Federal Constitution in quite a significant way. Therefore, amendments to the Federal Constitution is not something that has never been done before, which was also the case with India before the advent of *Kesavananda Bharati* and the cases that followed it.

[545] In much the same way as the case of a revolution, the Malaysia Act of 1963 and later Act 59/1966 passed after Singapore ceased to be part of Malaysia and where the present two High Courts were renamed, was without a doubt a radical change so fundamental and material in nature in the constitutional order of 1957 that it brought about a new and valid legal order not provided for or contemplated in the old order of the 1957 Constitution (*Makenete v Lekhanya* [1993] 3 LRC 13; *Mokotso and Others v HM King Moshoeshoe II and Others* [1989] LRC (Const) 24).

[546] If one were to accept as an unquestionable political fact that the

Malaysia Act of 1963 and the constitutional amendment made to art 121 must remain constitutionally valid at all times, it necessarily presupposes that Parliament may, by law or constitutional amendment, modify a 'basic structure' of the Federal Constitution.

[547] Our own experience with the Malaysia Act of 1963 is the most defining testimony of the breadth of legislative power, showing that being a basic structure of the Federal Constitution per se is not inviolable. The Legislature may still by law or constitutional amendment alter a 'basic structure' of the Federal Constitution.

[548] If that were not to be the case, then *in arguendo* there is a compelling reason for this court to strike down the amended art 121 brought about by the Malaysia Act 1963, in that the creation of the two High Courts and the vesting of judicial power in them is ultra vires the basic structure of the Federal Constitution, which vested judicial power of the Federation in the Supreme Court.

[549] In the converse, if the 1963 amendment which brought about the new Borneo High Court and the vesting of judicial power in it were to be sustained, then it stands to reason that the subsequent 1988 amendment on art 121 must likewise be sustained on the same reason that the Legislature is not inhibited from altering a 'basic structure' of the Federal Constitution.

ARTICLE 121(1) OF THE FEDERAL CONSTITUTION

[550] Article 121(1) of the Federal Constitution needs further deliberation. To recapitulate, the appellant's argument is that s 59A of the Immigration Act is unconstitutional because it violates the doctrine of separation of powers, which is a 'basic structure' of the Federal Constitution. This begs the questions:

(a) does art 121(1) of the Federal Constitution have any constitutional force of law? and

(b) if the answer is in the affirmative, is s 59A of the Immigration Act void under art 4(1) because it is inconsistent with art 121(1)?

[551] For context and for ease of reference, art 121(1) of the Federal Constitution is reproduced again below:

> (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely —
>
> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

A (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) *(Repealed),*

B and such inferior courts as may be provided by federal law *and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law*. (Emphasis added.)

C **[552]** The words in bold set out the jurisdictional parameters of the two High Courts and inferior courts of Malaya and Sabah and Sarawak. The point to note here is that the jurisdiction and powers of the courts, as determined by art 121(1) of the Federal Constitution are 'as may be conferred by or under federal law'. The expression used in the old art 121(1) prior to its amendment D in 1988 was 'as may be provided by federal law', which essentially means the same thing. Federal law means legislation passed by the federal Legislature, ie Parliament. In our context, it refers to s 59A of the Immigration Act which confers on the two High Courts their jurisdiction and powers over immigration matters.

E

[553] Article 121(1) of the Federal Constitution is not free from controversy and has been the subject of sustained discussions pro and contra but the reality is that it is there in the Federal Constitution and has not been amended or F repealed by Parliament; neither has it been struck down by any court of law of competent jurisdiction as being unconstitutional, probably because this court in the trinity of cases was not called upon to do so.

[554] But it could also be due to the view taken by *Semenyih Jaya* that being a G 'basic structure' of the Federal Constitution, art 121(1) which houses the doctrine of separation of powers cannot be removed or repealed even by constitutional amendment. Ironically however, *Semenyih Jaya* disapproved of art 121(1) and this is expressed in the following words of Zainun Ali FCJ who wrote the judgment of the court:

H [74] Thus, it is clear to us that the 1988 amendment had the effect of undermining the judicial power of the Judiciary and impinges on the following features of the Federal Constitution:

(i) The doctrine of separation of powers; and

I (ii) The independence of the Judiciary.

[75] *With the removal of judicial power from the inherent jurisdiction of the Judiciary, that institution was effectively suborned to Parliament, with the implication that Parliament became sovereign. This result was manifestly inconsistent with the supremacy of the Federal Constitution enshrined in art 4(1)*. (Emphasis added.)

[555] The learned judge was of course referring to the 1988 amendment of art 121(1) of the Federal Constitution which according to Her Ladyship had 'removed' judicial power from the inherent jurisdiction of the Judiciary. It was a tacit approval of the sentiment expressed by Richard Malanjum CJ (Sabah and Sarawak) (later Chief Justice) in his dissenting judgment on art 121(1) of the Federal Constitution in the earlier decision of this court in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1; [2007] 6 CLJ 341 where the learned CJ (Sabah and Sarawak) said:

> At any rate I am unable to accede to the proposition that with the amendment of art. 121(1) of the Federal Constitution (the amendment) the Courts in Malaysia can only function in accordance with what have been assigned to them by federal laws. Accepting such proposition is contrary to the democratic system of government wherein the courts form the third branch of the government and they function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them.
>
> [38] The amendment which states that 'the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law' should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of our Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law.

[556] What the learned CJ (Sabah and Sarawak) was saying is that art 121(1) is incompatible with the doctrine of separation of powers and independence of the Judiciary, which are 'basic features' of the Federal Constitution, by giving Parliament the power to pass laws that make the courts 'servile agents of a federal Act of Parliament'.

[557] The sentiment is understandable and probably shared by many, but in all humility and with the greatest of respect, unless and until art 121(1) of the Federal Constitution is amended or repealed by Parliament or struck down by a court of law of competent jurisdiction as being unconstitutional, the full force of the constitutional provision must be given effect to. The Federal Constitution is the supreme law of the land, which every single judge of the superior courts has solemnly sworn to uphold upon taking his or her oath of judicial office.

[558] The view that the majority took in *Kok Wah Kuan* was that the extent of judicial power depends on what federal law provides but which *Semenyih Jaya* disagreed with by saying that the majority had given a 'narrow interpretation' of art 121(1) of the Federal Constitution. It was suggested that the Federal Constitution has to be interpreted organically and with less rigidity, citing *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi vin Syed Idrus* [1981] 1 MLJ 29; [1984] 1 CLJ 28; [1984] 1 CLJ Rep 98.

[559] It is unacceptable for the appellant to treat art 121(1), which contains the term 'the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law', as if it is not there in the Federal Constitution on the ground that it impinges on the doctrine of separation of powers but at the same time to argue that it is a basic structure of the Federal Constitution which cannot be removed or abrogated even by constitutional amendment. That is a gross contradiction in terms.

[560] The appellant does not deny that s 59A of the Immigration Act was enacted pursuant to art 121(1) of the Federal Constitution. What she rejects is the notion that art 121(1) confers on Parliament the power to enact laws that circumscribe judicial power, which according to her violates the doctrine of separation of powers, which in turn violates the doctrine of basic structure as separation of powers is a basic structure of the Federal Constitution. However, she stops short of saying that art 121(1) is unconstitutional, in particular that part of the article which provides that 'the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law'.

[561] In truth, therefore, the real target of the appellant's attack, using the doctrine of basic structure as a weapon, is art 121(1) of the Federal Constitution. Section 59A of the Immigration Act is merely a decoy. It is a collateral attack on art 121(1) and a clever way of impugning the constitutional provision without actually asking for it to be struck down as unconstitutional: see the recent decision of this court in *Ann Joo Steel Bhd v Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor and another appeal* [2020] 1 MLJ 689 on collateral attacks.

[562] The position that the appellant takes is wholly untenable. Being a provision that governs judicial power of the Federation, art 121(1) of the Federal Constitution cannot be suborned to any doctrine of law, including the Indian doctrine of basic structure and the common law doctrine of separation of powers. No doctrine of law can override art 121(1) of the supreme law, which stipulates in very clear language that the jurisdiction and powers of the High Courts and inferior courts are 'as may be conferred by or under federal law'. The question of this express term of the supreme law being in violation of the doctrine of separation of powers does not arise.

[563] It is now settled that English common law concepts are to be applied only in so far as the circumstances permit and save where no provision has been made by statute law. This was made clear by Hashim Yeop Sani CJ (Malaya) in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356; [1990] 1 CLJ 675; [1990] 1 CLJ Rep 57 when he spoke of s 3(1) of the Civil Law Act 1956. This is what the learned judge said:

> Section 3 of the Civil Law Act 1956 directs the courts to *apply the common law of*

England only in so far as the circumstances permit and save where no provision has been made by statute law. The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country. We cannot just accept the development of the common law in England. See also the majority judgments in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12; [1988] 1 CLJ Rep 63. (Emphasis added.)

[564] It is therefore for our courts now to develop our own common law but it must not be done at the expense of the Federal Constitution. The Interpretation Acts 1948 and 1967 by ss 3 and 66 define 'written law' to include the Federal Constitution. The two sections are reproduced below:

Section 3

'written law' means —

(a) the Federal Constitution and the Constitutions of the States and subsidiary legislation made thereunder;

(b) Acts of Parliament and subsidiary legislation made thereunder;

(c) Ordinances and Enactments (including any federal or State law styling itself an Ordinance or Enactment) and subsidiary legislation made thereunder; and

(d) any other legislative enactments or legislative instruments (including Acts of Parliament of the United Kingdom of Great Britain and Northern Ireland and Orders in Council and other subsidiary legislation made thereunder) which are in force in Malaysia or any part thereof;

Section 66

'written law' means all Acts of Parliament, Ordinances and Enactments in force in the Federation or any part thereof and all subsidiary legislation made thereunder, and includes the Federal Constitution;

[565] The common law of England is excluded from the above definition of 'written law'. Thus, as far as judicial power of the Federation is concerned, art 121(1) of the Federal Constitution is the highest form of written law in the land. Indeed, by virtue of art 4(1), any post-Merdeka law that is inconsistent with the Federal Constitution is void to the extent of the inconsistency.

[566] *A fortiori*, if even a written law duly passed by Parliament is void under art 4(1) where it is inconsistent with the Federal Constitution, it stands to reason that no common law doctrine can prevail over any provision of the Federal Constitution, and this includes art 121(1). In any case, the doctrine of separation of powers, being a doctrine of universal application in any democracy, is already imbibed in art 121(1) of the Federal Constitution, subject to the terms of the article itself.

[567] The following observations by Azahar Mohamed CJ (Malaya) in *Letitia Bosman* at paras 48–50 of the judgment although made in the context of Parliament's power to prescribe criminal punishment are pertinent to the point:

> [48] This leads me to the following question. Which branch of the government then has the power to determine the measure of punishment or power to prescribe punishment? That question must be examined in the context of the FC. It bears noting in this regard that as lucidly stated by Joseph M Fernando in *Federal Constitutions, A Comparative Study of Malaysia and the United States*, at p vii, 'Constitutions are the basic fundamental laws of most modern nations and the highest source of legal authority. Constitutions provide for a pattern of Government and define the distribution of powers between the various organs of Government and the limits of the government over the governed'.
>
> [49] Evidently, Parliament derives its legislative power from the FC. The power to legislate is a plenary power vested in Parliament. The issue of legislative competency is to be decided by reference to matters falling within Parliament's power to legislate. What is important in the setting of the present appeals is that the constitutional scheme of the FC empowers Parliament, the legislative branch of the government to make laws with respect to any of the matters enumerated in cl (1) art 74 of the FC and the Federal List as set out in the Ninth Schedule. The constitutional provisions highlight the fundamental principle relating to the power of Parliament to make law in respect of a particular matter pursuant to the FC. In this regard, item 4 of the Federal List provides for 'civil and criminal law', including in para (h) 'creation of offences in respect of any of the matters included in the Federal List or dealt with by Federal law'.
>
> [50] An important point to note is that the words 'with respect to' in art 74 must be interpreted with extensive amplitude. The cardinal rule of interpretation is that the entries in the legislative lists are not to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. The widest possible construction, according to the ordinary meaning of the words in the entry, must be put upon them. In construing the words in a constitutional document conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in widest amplitude (see: *Raja Jagannath Baksh Singh v The State of Uttar Pradesh* [1962] AIR 1563, *The State Of Rajasthan v Shri G Chawla And Dr Pohumal* [1959] AIR 544 and *Elel Hotels And Investments Ltd v Union Of India* 1990 AIR 1664). I have also discussed this area of the law in *Mohd Khairul Azam Abdul Aziz v Menteri Pendidikan Malaysia & Anor* [2020] 1 MLJ 398; [2019 1 LNS 1695; [2020] 9 CLJ 309. As observed by the Court of Appeal in *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Other Appeals* [1997] 3 MLJ 23; [1997] 4 CLJ 253 at p 273 (CLJ); p 37 (MLJ):
>
> > It is also well settled that the phrase 'with respect to' appearing in art 74(1) and (2) of the Federal Constitution — the provision conferring legislative power upon the Federal and State Governments respectively — is an expression of wide import. As observed by Latham CJ in *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at p 186, in relation to the identical phrase appearing in s 51 of the Australian Constitution which confers Federal legislative

authority:

> A power to make laws 'with respect to' a specific subject is as wide a legislative power as can be created. No form of words has been suggested which would give a wider power. The power conferred upon a Parliament by such words in an Imperial statute is plenary as wide as that of the Imperial Parliament itself: *R v Burah* (1878) 3 App Cas 889; *Hodge v R* (1883) 9 App Cas 117. But the power is plenary only with respect to the specified subject.

[568] For the record, *Letitia Bosman* is a recent decision of this court that was decided by a majority of 8–1. With the greatest of respect to the learned judge in *Semenyih Jaya*, it was incorrect for Her Ladyship to imply that art 121(1) is 'manifestly inconsistent' with art 4(1) of the Federal Constitution. All articles of the Federal Constitution are of equal standing as between themselves and are not subordinate to any other. As Raja Azlan Shah FJ explained in *Loh Kooi Choon* when he spoke of the effect of amendment to the Federal Constitution:

> When that is done it becomes an integral part of the Constitution, *it is the supreme law, and accordingly it cannot be said to be at variance with itself*. A passage from the Privy Council judgment in *Hinds v The Queen*, is of some assistance (p 392):
>
> > That the Parliament of Jamaica has power to create a court ... is not open to doubt, but if any of the provisions doing so conflict with the Constitution in its present form, then it could only do so effectively if the Constitution was first amended so as to secure that there ceased to be any inconsistency between the provisions and the Constitution ... (Emphasis added.)

[569] A distinction must be drawn between ordinary laws enacted in the ordinary way and Acts of Parliament that affect the Federal Constitution. It is federal law of the former category that is meant by 'law' in art 4(1): see *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793; [1993] 1 CLJ 264 at p 813 where the Supreme Court held:

> It is true that the Constitution is the supreme law of the land. But 'law' in art 4(1), with reference to Acts of Parliament, means federal law consisting of ordinary laws enacted in the ordinary way and not Acts affecting the Constitution. Only the former must be consistent with the Constitution. As Suffian LP said in *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70; [1979] 1 LNS 67 at p 72:
>
> > In our judgment, in construing art 4(1) and art 159, the rule of harmonious construction requires us to give effect to both provisions and to hold and we accordingly hold that Acts made by Parliament, complying with the conditions set out in art 159, are valid even if inconsistent with the Constitution, and that a distinction should be drawn between on the one hand Acts affecting the Constitution and on the other hand ordinary laws enacted in the ordinary way. *It is federal law of the latter category that is meant by law in art 4(1); only such law must be consistent with the Constitution*. (Emphasis added.)

A THE BASIC STRUCTURE DOCTRINE

[570] I must start by saying that it is not so much the existence of 'basic structures' in the Federal Constitution that gives rise to controversy. There is nothing wrong to describe the fundamental features of the Federal Constitution as its 'basic structures'. What poses a problem in the context of a written constitution is the application of the so-called 'doctrine' of basic structure. Under the doctrine, any law passed by Parliament that 'offends' the basic structure of the Federal Constitution is void.

[571] The difficulty with the doctrine is that 'basic structure' is not confined to the written terms of the Federal Constitution. It has been extrapolated to include a doctrine of law, in this case the doctrine of separation of powers. This leads to a situation where a law that is duly passed by Parliament is rendered void for offending the doctrine of separation of powers even where it is not inconsistent with the express terms of the Federal Constitution. Herein lies the paradox.

[572] The appellant's argument is that in the light of *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza*, s 59A of the Immigration Act has 'no leg to stand on'. What the appellant is saying in effect is that s 59A of the Immigration Act is void because the leg on which it stands, ie art 121(1) of the Federal Constitution violates the doctrine of separation of powers by empowering Parliament to pass laws that limit judicial power, and by violating the doctrine of separation of powers, it violates the doctrine of basic structure. There is no denying that by invoking the doctrine of basic structure, the appellant is questioning not only Parliament's power to enact s 59A of the Immigration Act but also the constitutional validity of art 121(1) itself. It is, in a manner of speaking, an attempt to kill two birds with one stone.

[573] The fact that both *Semenyih Jaya* and *Indira Gandhi* applied the basic structure doctrine is patently clear and is borne out by the following paragraphs in the judgment of the learned judge in *Indira Gandhi*, who coincidentally was the same learned judge who wrote the judgment in the earlier case of *Semenyih Jaya*:

> Paragraph 22
>
> Basic Structure Of The Constitution
>
> [22] Before dealing with the heart of the matter in these appeals, a clear understanding of the foundation, content and effect of the basic structure of the Constitution is in order.'
>
> Paragraph 33–34
>
> *Significance Of Basic Structure*

[33] The basic structure of a constitution is 'intrinsic to, and arises from, the very nature of a constitution.' (see Calvin Liang and Sarah Shi, 'The Constitution of Our Constitution, A Vindication of the Basic Structure Doctrine' Singapore Law Gazette (August 2014) 12). The fundamental underlying principles and the role of the Judiciary as outlined above form part of the basic structure of the constitution, being 'something fundamental and essential to the political system that is established thereunder' (per Sundaresh Menon CJ in *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189; [2011] SGCA 9 (at [71]. It is well settled that features of the basic structure cannot be abrogated or removed by a constitutional amendment (see *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461).

[34] Further, as a feature intrinsic to and inherent in the constitutional order itself, *these principles are accorded supreme status as against any inconsistent laws*, in a political system based on constitutional supremacy. Article 4(1) of the Federal Constitution provides that the Constitution is 'the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

Paragraph 36

[36] The Federal Court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 5 CLJ 526 has put beyond a shadow of doubt that judicial power is vested exclusively in the High Courts by virtue of art. 121(1). *Judicial independence and the separation of powers are recognized as features in the basic structure of the Constitution*.

Paragraph 45–47

Significance Of Judicial Review As Part Of The Basic Structure

[45] The significance of the exclusive vesting of judicial power in the Judiciary, and the vital role of judicial review in the basic structure of the constitution, is twofold. First, judicial power cannot be removed from the civil courts. The jurisdiction of the High Courts cannot be truncated or infringed. Therefore, even if an administrative decision is declared to be final by a governing statute, an aggrieved party is not barred from resorting to the supervisory jurisdiction of the court. The existence of a finality clause merely bars an appeal to be filed by an aggrieved party.

[46] In *Liyanage*, the issue before the Privy Council was the validity of an Act of Parliament which widened the class of offences triable by judges nominated by the Minister of Justice and removed the judges' discretion in terms of sentencing. The Privy Council held that the Act contravened the Constitution of Ceylon in usurping the judicial power of the judicature. Lord Pearce elaborated as follows (at pp 291–292):

> If such Acts as these were valid the judicial power could be wholly absorbed by the Legislature and taken out of the hands of the judges. It is appreciated that the Legislature had no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. *And thus judicial power may be eroded.*

> *Such an erosion is contrary to the clear intention of the Constitution. In their Lordships' view the Acts were ultra vires and invalid.* (Emphasis added.)

> [47] Secondly, judicial power cannot be conferred on any other body whose members do not enjoy the same level of constitutional protection as civil court judges do to ensure their independence. 'Parliament cannot just declare formally that a new court is a superior court or shares the rank of being at the apex of the judicial hierarchy; the test is substantive, requiring an examination of the composition and powers of the new court' (see *Semenyih Jaya* and also Thio Li-Ann, *A Treatise on Singapore Constitutional Law* (2012: Singapore, Academy Publishing) at 10.054). (Emphasis added.)

[574] In the last sentence of para 33 above, the learned judge made specific reference to *Kesavananda Bharati*, the origin of the basic structure doctrine, in taking the view that 'features' of the basic structure of the Federal Constitution cannot be abrogated or removed even by constitutional amendment. *Alma Nudo Atenza* took the same approach as can be seen from the following observation by Richard Malanjum CJ (Sabah and Sarawak) delivering the judgment of the court at para 73:

> [73] In fact courts can prevent Parliament from destroying the 'basic structure' of the FC (see *Sivarasa Rasiah* at para 20). And while the FC does not specifically explicate the doctrine of basic structure, *what the doctrine signifies is that a parliamentary enactment is open to scrutiny not only for clear-cut violation of the FC but also for violation of the doctrines or principles that constitute the constitutional foundation*. (Emphasis added.)

[575] By citing *Sivarasa Rasiah* it is obvious that the learned CJ (Sabah & Sarawak) was also referring to the doctrine of basic structure propounded in *Kesavananda Bharati*. Undoubtedly, the 'basic structure' doctrine featured prominently in *Semenyih Jaya* and *Indira Gandhi* and weighed heavily in the mind of the learned judge who wrote both judgments. As mentioned earlier in this judgment, *Semenyih Jaya* and *Indira Gandhi* could be misunderstood to mean that art 121(1) of the Federal Constitution has removed judicial power from the courts and this violates the basic structure doctrine by violating the doctrine of separation of powers.

[576] Going by the appellant's submissions both written and oral, it is this alleged breach of the basic structure doctrine that forms the structural base of her argument that s 59A of the Immigration Act is void and ought to be struck down as being unconstitutional.

[577] Given the importance that *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza* placed on the basic structure doctrine and given the appellant's heavy reliance on these three cases, it is incumbent on me to touch briefly on the doctrine — what is it all about, where does it come from and how it has

shaped the direction of our constitutional jurisprudence. A

[578] Indeed, leave question 3 specifically asks this court to determine if s 59A of the Immigration Act is valid and constitutional 'in the light' of *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza* and this is emphasised in the written submissions of learned counsel for the appellant where he contended that s 59A of the Immigration Act has no leg to stand on 'in the light' of these three cases. B

[579] Thus, what the appellant wants is for this court to strike down s 59A of the Immigration Act as unconstitutional on the ground that it violates the basic structure doctrine by violating the doctrine of separation of powers, not so much because it is inconsistent with the express terms of art 121(1) of the Federal Constitution which provides that the jurisdiction and powers of the courts are 'as may be conferred by or under federal law'. The plain truth is, s 59A of the Immigration Act is not inconsistent with art 121(1) and this should be obvious to the appellant. C D

[580] The basic structure doctrine is an Indian concept that was developed by the Supreme Court of India in *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461; (1973) 4 SCC 225. The doctrine established the principle that the constitution can be amended but not its 'basic structure' as Parliament's power to amend is not a power to destroy. E

[581] The mischief that the doctrine aims to strike down is the abuse by the Indian Parliament of its power to amend the Indian Constitution by destroying its basic features. The doctrine therefore works on the footing that Parliament amends the constitution and the amendment destroys its 'basic structure'. It follows that where no amendment is made to the constitution, the doctrine has no application and is irrelevant. F G

[582] The doctrine made its first landing on our shores in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187; [1975] 1 LNS 90 (*Loh Kooi Choon*). It was immediately rejected by the former Federal Court. This is what Raja Azlan Shah FJ (as he then was) delivering the judgment of the court (the other judgment being delivered by Wan Suleiman FJ) said: H

> Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it *is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording 'can never be overridden by the extraneous principles of other Constitutions' — see Adegbenro v Akintola & Anor* [1963] 3 All ER 544, 551. Each country frames its constitution according to its genius and for the good of its own society. We look at other Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law ... I

> It is therefore plain that the framers of our Constitution prudently realised that future context of things and experience would need a change in the Constitution, and they, accordingly, armed Parliament with 'power of formal amendment'. They must be taken to have intended that, while the Constitution must be as solid and permanent as we can make it, there is no permanence in it. There should be a certain amount of flexibility so as to allow the country's growth. In any event, they must be taken to have intended that it can be adapted to changing conditions, and that the power of amendment is an essential means of adaptation. A Constitution has to work not only in the environment in which it was drafted but also centuries later ...
>
> *There have also been strong arguments in support of a doctrine of implied restrictions on the power of constitutional amendment. A short answer to the fallacy of this doctrine is that it concedes to the court a more potent power of constitutional amendment through judicial legislation than the organ formally chosen by the Constitution for the exercise of the amending power.* (Emphasis added.)

[583] It was a rejection by the former Federal Court of the idea that Parliament has no power to amend the Federal Constitution. *Loh Kooi Choon* was followed and reaffirmed in two other decisions of this court in *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70; [1979] 1 LNS 67 and *Mark Koding v Public Prosecutor* [1982] 2 MLJ 120; [1982] 1 LNS 15.

[584] The rejection by *Loh Kooi Choon* of the basic structure doctrine stood the test of time for some 33 years before it was overruled by this court through the judgment of Gopal Sri Ram FCJ in *Sivarasa Rasiah* in 2010, which then adopted the doctrine as part of our law. In overruling *Loh Kooi Choon*, one of the reasons given by Gopal Sri Ram FCJ was that Raja Azlan Shah FJ committed an error of law in relying on the pronouncement by Lord Macnagthen in the *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at p 118 which was made in the context of a country whose Parliament is supreme, unlike Malaysia where the Constitution is supreme. I shall revert to this issue later in this judgment.

EFFECT OF *SIVARASA RASIAH*

[585] The adoption of the basic structure doctrine by this court through *Sivarasa Rasiah* marked the beginning of a sharp turn away from the position held by the former Federal Court in *Loh Kooi Choon*. It changed our constitutional law in a fundamental way. The most far-reaching implication of the decision is that Parliament has no power by any means whatsoever to amend or to remove any 'basic structure' of the Federal Constitution, not even by recourse to art 159, hence *Semenyih Jaya*'s pronouncement that no 'basic structure' of the Federal Constitution can be abrogated or removed even by constitutional amendment. This means all 'basic structures' of the Federal Constitution, whatever they are and without exception, must remain untouched by Parliament forever and in perpetuity, for better or for worse.

[586] It bears emphasis that what art 121(1) of the Federal Constitution provides as it presently stands is that the jurisdiction and powers of the courts are 'as may be conferred by or under federal law'. Applying the basic structure doctrine as advocated by the appellant, it must therefore follow that the vesting of power in Parliament by art 121(1) to legislate on the parameters of judicial power must also be treated as a 'basic structure' of the Federal Constitution, and being a basic structure, it must remain forever in the Federal Constitution and cannot be removed even by recourse to art 159. It cannot be 'amended' or 'removed' by indirect means. It must remain a permanent feature of the Federal Constitution.

[587] In dealing with fundamental rights guaranteed by Part II of the Federal Constitution, this is what Gopal Sri Ram FCJ said in *Sivarasa Rasiah*:

> Further, it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, *any statute (including one amending the Constitution)* that offends the basic structure may be struck down as unconstitutional. (Emphasis added.)

[588] This was a major departure from the basic structure doctrine itself which works on the footing that an amendment is made to the constitution and the amendment destroys its basic structure. The doctrine has no application where no amendment is made to the constitution, which was the case with *Sivarasa Rasiah*. Obviously, the learned judge was not talking of a situation where an amendment has been made to the Federal Constitution, although he spoke of the need for prior sanction by the constitution itself. The effect of the decree by the learned judge is that any ordinary law passed by Parliament that 'offends' the basic structure doctrine may be struck down as unconstitutional.

[589] This conflicts with art 4(1) of the Federal Constitution which provides that post-Merdeka laws are void only if they are inconsistent with the Federal Constitution. In the context of the present case, s 59A of the Immigration Act can only be struck down as unconstitutional if it is inconsistent with the following term of art 121(1) of the Federal Constitution — 'the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law'.

[590] It is a term that defines the jurisdiction and powers of the courts under s 59A of the Immigration Act. The appellant has not shown how s 59A of the Immigration Act is inconsistent with this express and explicit term of art 121(1) other than to say that it violates the doctrine of separation of powers, which she says is a 'basic structure' of the Federal Constitution.

[591] The effect of *Sivarasa Rasiah* is that although art 121(1) of the Federal

Constitution, which vests judicial power in the courts, remains intact and is not affected by the enactment of s 59A of the Immigration Act, the section may still be declared void simply for offending a doctrine of law that 'destroys' the basic structure of the Federal Constitution.

[592] Gopal Sri Ram FCJ made no mention of *Maneka Gandhi v Union of India* 1978 AIR SC 597; (1978) 1 SCC 248 (*Maneka Gandhi*) in *Sivarasa Rasiah* but it is clear that His Lordship's view coincides with the decision in that case. In that case, the Indian Supreme Court extended the doctrine's importance as superior to any parliamentary legislation. It held that *no Act of Parliament can be considered law if it 'violates' the basic structure of the Indian Constitution*. However, the Supreme Court fell short of saying that the doctrine is superior to the Indian Constitution.

[593] In the context of the present appeal, the question that needs a firm answer from this court is this — can a doctrine of law prevail over a written term of the Federal Constitution? Put another way, is a doctrine of law supreme or is it the Federal Constitution that is supreme?

[594] Given the change in character of the basic structure doctrine so soon after its inception in *Kesavananda Bharati*, the application of the doctrine in Malaysia has not always been free from difficulty, largely due to the fact that there is no explicit exposition of what constitutes 'basic structure' of the Federal Constitution.

[595] This is not surprising because even among the majority in *Kesavananda Bharati* (the case was decided by a majority of 7–6) the top judges of the Indian apex court had differing opinion on what 'basic structure' of the Indian Constitution comprised and this is compounded by the fact that the claim of any particular feature of the constitution to be 'basic' is to be determined by the court on a case to case basis: see *Indira Nehru Gandhi v Raj Narain* AIR 1975 SC 2299; *Minerva Mills Ltd & Ors v Union of India & Ors* 1980 AIR 1789.

[596] Thus, at the Court of Appeal stage of *Sugumar Balakrishnan*, Gopal Sri Ram JCA (as he then was) declared judicial review as a 'basic and essential feature' of the Federal Constitution. *Semenyih Jaya* recognised judicial independence and separation of powers as its basic structures. *Indira Gandhi* added other features, namely the rule of law, fundamental liberties and protection of the minority. In the case before us, learned counsel for the appellant suggested freedom of speech, personal liberty, right to travel and natural justice as forming part of the basic structure of the Federal Constitution. More will no doubt be added to the list. The proposition if accepted means that the stable doors are now wide open and the horses are ready to bolt out.

[597] Whatever may be added as forming part of the 'basic structure' of the Federal Constitution, there can be no argument that post-Merdeka laws are only to be declared void under art 4(1) if they are inconsistent with the Federal Constitution and for no other reason. In the present case, the question for the purposes of art 4(1) is whether s 59A of the Immigration Act is inconsistent with art 121(1) and not whether it is inconsistent with any doctrine of law no matter how formidable the doctrine of law is. In any event a doctrine of law cannot prevail over the Federal Constitution.

[598] By relying on *Sivarasa Rasiah*, *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza*, the appellant is suggesting that being in violation of the doctrine of separation of powers, art 121(1) of the Federal Constitution lacks the force of law to give legitimacy to s 59A of the Immigration Act.

[599] As if the space occupied by art 121(1) of the Federal Constitution is left *in vacuo*, ie saying nothing on the power of Parliament to legislate on the jurisdiction and powers of the courts, the appellant is now reading into the Article a doctrine of law that dilutes to the point of dissipation the article's constitutional mandate that the High Courts and inferior courts shall have such jurisdiction and powers 'as may be conferred by or under federal law'. For all practical purposes, it is the doctrine of separation of powers that now governs the jurisdiction and powers of the courts, in place of art 121(1) of the Federal Constitution. Thus, any post-Merdeka law that circumscribes or 'removes' judicial power from the courts in breach of the doctrine of separation of powers will be void and liable to be struck down as unconstitutional even where it is not inconsistent with art 121(1).

[600] What the proposition amounts to is to elevate the status of the doctrine of separation of powers above that of the Federal Constitution. This is a dangerous proposition as it practically transforms the doctrine of separation of powers into the supreme law of the land in place of the Federal Constitution, effectively putting an end to constitutional supremacy that this country subscribes to as enshrined in art 4(1) of the Federal Constitution which declares that 'This Constitution shall be the supreme law of the Federation'.

[601] The appellant's contention is probably inspired by the following statement by Richard Malanjum CJ (Sabah and Sarawak) in his dissenting judgment on art 121(1) of the Federal Constitution in *Kok Wah Kuan* which Zainun Ali FCJ quoted with approval in *Semenyih Jaya*:

> At any rate I am unable to accede to the proposition that with the amendment of art. 121(1) of the Federal Constitution (the amendment) the Courts in Malaysia can only function in accordance with what have been assigned to them by federal laws.
>
> ...

A [38] *The amendment which states that 'the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law' should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of our Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a federal* B *Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law*. (Emphasis added.)

[602] The first paragraph above can be misunderstood as a repudiation of art 121(1) of the Federal Constitution while the words in bold in the second C paragraph can be misunderstood as recognising the doctrine of separation of powers as superior to the doctrine of constitutional supremacy.

[603] With all due respect, *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza* had been misconstrued and misapplied by the appellant. There is D absolutely nothing in the judgments to say that art 121(1) of the Federal Constitution has no force of law to confer on Parliament the power to enact ouster clauses such as s 59A of the Immigration Act. On the contrary, *Semenyih Jaya* in fact recognised the power of the Legislature to enact laws limiting E appeals by declaring the finality of a High Court order because to hold otherwise would be contrary to sub-s 68(1)(d) of the Courts of Judicature Act 1964.

[604] *Semenyih Jaya* is authority for the proposition that a non-judicial body F cannot bind the superior courts, *Indira Gandhi* for the proposition that Syariah courts are not of equal status to the superior civil courts while *Alma Nudo Atenza* is authority on the constitutionality of s 37A of the Dangerous Drugs Act 1952. They are not, first of all, cases on the validity of s 59A of the Immigration Act, an ouster clause that draws its legitimacy and force of law G from art 121(1) of the Federal Constitution and which this court in *Sugumar Balakrishnan* had held to be valid law.

[605] Further, even if they are ouster clauses, the impugned statutory provisions in the three cases are not ouster clauses in the mould of s 59A of the H Immigration Act. Thus, the observations in those cases where they touch on the constitutional point raised in the present appeal are at best obiter dicta and should not have been given too much emphasis on.

[606] To reiterate, the question to ask in the context of the present case is not I whether s 59A of the Immigration Act is inconsistent with or is in violation of the doctrine of separation of powers or has destroyed the basic structure of the Federal Constitution but whether it is inconsistent with art 121(1) of the Federal Constitution. That is the test to determine if the post-Merdeka law is void.

[607] And *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza* cannot be read, as the appellant seems to be reading them, as deciding that Parliament has no power to amend the Federal Constitution. As Suffian LP said 45 years ago in *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70; [1979] 1 LNS 67:

> If it is correct that amendments to the Constitution are valid only if consistent with its existing provisions, then clearly no change whatsoever may be made to the Constitution; in other words Art. 159 is superfluous, for the Constitution cannot be changed or altered in any way, as if it has been carved in granite.

[608] Quoting the words of the Privy Council in *Bribery Commissioners v Ranasinghe* [1965] AC 172 the learned judge went on to say:

> ... a constitution [certainly our constitution] can, indeed, be altered or amended by the Legislature, if the regulating instrument so provides and if the terms of those provisions are complied with and the alteration or amendment may include the change or abolition of those very provisions.

[609] Incidentally, Suffian LP's view accords with the view expressed by Lord Bingham in the Privy Council case of *Director of Public Prosecutions of Jamaica v Mollison* [2003] 2 WLR 1160 at p 1170 where he said that 'a constitution is not trapped in a time-warp but must evolve over time to reflect the developing needs of society'.

[610] Zainun Ali FCJ in endorsing Gopal Sri Ram FCJ's opinion in *Sivarasa Rasiah* said in *Semenyih Jaya*:

> [81] Thus, *Sivarasa* made a frontal attack on *Loh Kooi Choon* where the Federal Court in *Sivarasa* tersely observed that:
>
> > ... the fundamental rights guaranteed under Part II is part of the basic structure of the Constitution and that Parliament cannot enact laws (including Act amending the Constitution) that violate the basic structure. (Emphasis added.)

[611] The statutory provision in *Semenyih Jaya* that was held to have violated the basic structure of the Federal Constitution was a section in the Land Acquisition Act 1960 which binds judges of the High Court to the opinion of the assessors in determining the quantum of compensation in land acquisition cases. It was so held because Parliament by enacting that section had consigned judicial power that is reposed in the courts by art 121(1) of the Federal Constitution to the assessors. In the present case, it is s 59A of the Immigration Act that is said to have removed judicial power from the High Courts by limiting its scope.

[612] One of the sternest arguments made out by the appellant against s 59A of the Immigration Act is that it undermines the entire jurisprudence on judicial review so assiduously developed by the courts in the entire common

law world. It would also mean, according to counsel, that arbitrary executive decisions, no matter how foul they may otherwise be, will be insulated, or immunised from examination by the Judiciary, which the facts of the present case provide the clearest example.

[613] It is an attractive argument I must say but one that is not grounded on legal reality. With due respect to Professor Gurdial Singh Nijar, the question of undermining the entire jurisprudence on judicial review does not arise. In as much as the court abhors abuse of power by the executive, it has a higher duty to uphold the Federal Constitution.

[614] The whole integrity of the Federal Constitution will be undermined if the courts were to disregard the limitations imposed by Parliament (which represents the will of the people) through s 59A of the Immigration Act, a federal law that derives its legitimacy and force of law from art 121(1) of the Federal Constitution, which no unwritten rule of law or doctrine of law can override.

[615] In any case, it is incorrect to say that s 59A of the Immigration Act confers 'absolute and unfettered' power on the decision maker. The provision only limits judicial power by confining it to any question relating to non-compliance with any procedural requirement of the Immigration Act. It is not a wholesale removal of judicial power to render the entire executive action absolutely non-justiciable.

[616] Learned counsel acknowledged that in matters which are clearly within the purview of the administrative authorities, the court cannot usurp the role of the executive, which the court would consider as non- justiciable. Citing the decision of the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 ('CCSU'), counsel gave the following examples of such non-justiciable matters: the grant of pardon, bestowing of honours, matters of high policy such as the conduct of foreign relations (treaty making powers) and matters of national security.

[617] It was argued that in such cases the court will enquire whether the matters are, in reality, the exclusive preserve of the executive consonant with the separation of powers doctrine. In other words, the court looks at the subject matter and determines on this basis whether the matter is justiciable or not and is not dependent on whether there is an ouster clause or not, quoting Lord Scarman in the *CCSU* case where the learned judge said:

> Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter.

[618] It was pointed out that even in cases involving 'high policy', judicial review cannot be excluded and this according to counsel is established by *Indira Gandhi* when it cited with approval the Singapore Court of Appeal decision in *Tan Seet Eng v Attorney-General and another matter* [2015] SGCA 59.

[619] Counsel is right, of course, but only where the law in question is contrary to the terms of the Federal Constitution, which is not the case with s 59A of the Immigration Act vis a vis art 121(1) of the Federal Constitution.

Travel Ban

[620] I have determined that s 59A of the Immigration Act is valid and constitutional as it had been validly enacted by Parliament pursuant to the power vested in it by art 121(1) of the Federal Constitution, which means the decision of the Director General of Immigration to impose the travel ban on the appellant is not subject to judicial review save in the manner prescribed. Only procedural non-compliance is. Therefore, the only question left to be considered is whether there was failure by the respondents to comply with the procedure prescribed by the Immigration Act or the rules made thereunder, if any, when imposing the travel ban.

[621] The appellant's argument, however, goes beyond that and beyond the ambit of question 1 itself which is: 'Whether s 3(2) of the Immigration Act empowers the Director General the unfettered discretion to impose a travel ban. In particular, can the Director General impose a travel ban for reasons that impinge on the democratic rights of citizens such as criticising the government?'.

[622] It is quite clear that question 1 does not question the discretionary power of the Director General to impose the travel ban under s 3(2) of the Immigration Act. In fact, it acknowledges that the Director General has such discretionary power. What it questions is whether such power is 'unfettered', specifically whether a travel ban can be imposed for criticising the government, in this case 'Memburukkan Kerajaan Malaysia'. At the hearing however, the appellant's argument took a completely different turn. It was submitted that on a plain reading of s 3(2) of the Immigration Act, it does not confer power on the Director General to impose a travel ban or to issue a circular that carries with it the force of law.

[623] In other words, what the appellant is now saying is that not only is the Director General of Immigration bereft of unfettered discretion to impose the travel ban, but that he does not even have the power in the first place to impose the travel ban. Section 3(2) reads:

The Director General shall have the *general supervision and direction of all matters*

relating to immigration throughout Malaysia. (Emphasis added.)

[624] The provision is clear and unambiguous. It confers on the Director General a broad power over 'all matters relating to immigration'. Like s 59A of the Immigration Act, the provision is presumed to be constitutionally valid and the burden is on the appellant to prove otherwise. Perhaps the starting point in considering this issue is to remind ourselves of what Marshall CJ said in the American case of *Marbury v Madison* 1803 1 Cranch 137; 1803 5 US 137 in relation to the discretion vested in the executive. This is what the learned CJ said at page 170:

> The province of the court is solely to decide on the rights of individuals, *not to enquire how the executive, or executive officers, perform duties in which they have a discretion*. Questions, in their nature political or which are, by the constitution and laws, submitted to the executive, can never be made in this court. (Emphasis added.)

[625] In determining the lawfulness of the Director General's decision to impose the travel ban under s 3(2) of the Immigration Act, it is important to keep in mind that by virtue of s 59 of the same Act, the decision is not subject to a right of hearing. For ease of reference, the section is reproduced again below:

> 59. No person and no member of a class of person shall be given an opportunity of being heard before the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, makes any order against him in respect of any matter under this Act or any subsidiary legislation made under this Act.

[626] I have mentioned earlier that this provision has been held to be valid by this court in *Sugumar Balakrishnan*. I find no reason to depart from the decision. For this court to overrule the decision and to strike down s 59 of the Immigration Act as unconstitutional would mean that even an illegal immigrant could challenge the Director General's decision in court. It is of course his right to do so but this goes to show how untenable the situation can be if s 59 of the Immigration Act were to be struck down as unconstitutional.

[627] The fact that the respondents gave a wrong and invalid reason for imposing the travel ban on the appellant does not in any way alter the fact that in law they have no duty to provide reasons. Thus, even if the Director General was wrong in relying on a departmental circular which does not have any force of law to impose the travel ban, that does not turn his decision into a wrongful act if otherwise the decision was permitted by law, which is not subject to a right of hearing under s 59 and not subject to judicial review under s 59A of the Immigration Act.

[628] The appellant however argued that the scope and limits of such power must be circumscribed and not left open-ended. It was submitted that the section cannot be extrapolated to confer wide and untrammelled 'substantive powers' that would include imposing travel bans on citizens, adding that by applying the maxim *expressio unious est exclusion alterius* (when one or more things of a class are expressly mentioned, others of the same class are excluded), the power to impose a travel ban or any restriction on the freedom of speech of a citizen by any means (much less through an administrative circular) is excluded from the purview of the Immigration Act.

[629] According to counsel, to suggest otherwise is to confer on the first respondent absolute and unfettered powers to impose a travel ban and this should not be countenanced by the court, citing *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135; [1978] 1 LNS 143 where Raja Azlan Shah CJ (Malaya) (as he then was) delivering the judgment of the former Federal Court said that every legal power must have legal limits, otherwise there is dictatorship.

[630] Reliance was also placed on MP Jain's *Administrative Law in Malaysia and Singapore* (4th Ed) where the learned author writes at p 405:

> The first principle of the rule of law is that an authority exercising discretionary power must act according to law, it should confine itself within the scope of, and not exceed, the powers conferred on it by law; *and if an authority exceeds those limits, then its act is invalid*. (Emphasis added.)

[631] Comparisons were made between the Immigration Act and other statutes that give express power to the Director General of Immigration to prevent Malaysians from leaving Malaysia. The Passports Act 1966 ('the Passports Act') and the Income Tax Act 1967 ('the Income Tax Act') were cited as examples.

[632] Learned counsel went on to submit that there are 'multifarious procedures' which the Minister and/or the Director General of Immigration was obliged to comply with before he imposes a travel ban. However, he did not provide details of the 'multifarious procedures' under the Immigration Act or the rules made thereunder relating to a travel ban. The fact is, there is none in the Immigration Act.

[633] As a fall back, counsel relied on s 2 of the Passports Act and s 104 of the Income Tax Act to support his argument that there was procedural non-compliance with the Immigration Act by the respondents. Both sections are reproduced below:

> Section 2 of the Passports Act

(2) Every person leaving Malaysia for a place beyond Malaysia shall, if required so to do by an immigration officer produce to that officer a passport.

(3) An immigration officer may, in relation to any passport produced under this section, put to any person producing that passport such questions as he thinks necessary; and the person shall answer the questions truthfully.

(4) An immigration officer may make on any passport produced under this section such endorsement as he thinks fit.

Section 104 of the Income Tax Act

(1) The Director General, where he is of the opinion that any person is about or likely to leave Malaysia without paying —

(a) all tax payable by him (whether or not due or due and payable);

(b) all sums payable by him under subsection 103(1A), (3), (5) or (7) or subsection 107B(3) or (4) subsection 107C(9), (10) or (10A);

(c) all debts payable by him under subsection 107A(2) or 109(2), 109B(2) or 109F(2),

may issue to any Commissioner of Police or Director of Immigration a certificate containing particulars of the tax, sums and debts so payable with a request for that person to be prevented from leaving Malaysia unless and until he pays all the tax, sums and debts so payable or furnishes security to the satisfaction of the Director General for their payment.

(2) Subject to any order issued or made under any written law relating to banishment or immigration, any Commissioner of Police or Director of Immigration who receives a request under subsection (1) in respect of any person shall take or cause to be taken all such measures (including the use of reasonable force and the seizure, removal or retention of any certificate of identity and any passport, exit permit or other travel document relating to that person) as may be necessary to give effect to it.

(3) The Director General shall cause notice of the issue of a certificate under subsection (1) to be served personally or by registered post on the person to whom the certificate relates:

Provided that the non-receipt of the notice by that person shall not invalidate anything done under this section.

(4) Where a person in respect of whom a certificate has been issued under subsection (1) —

(a) produces a written statement signed on or after the date of the certificate by the Director General or an authorized officer to the effect that all the tax, sums and debts specified in the certificate have been paid or that security has been furnished for their payment; or

(b) pays all the tax, sums and debts specified in the certificate to the officer in charge of a police station or to an immigration officer,

the statement or the payment, as the case may be, shall be sufficient authority for allowing that person to leave Malaysia.

(5) No legal proceedings shall be instituted or maintained against the Government, a State Government, a police officer or any other public officer in respect of anything lawfully done under this section or subsection 115(2).

[634] The Passports Act, which must be read together with the Immigration Act by virtue of s 13 of the former Act, does not prescribe any procedure either for imposing a travel ban. Therefore, the question of procedural non-compliance with the Passports Act by the Director General of Immigration does not arise.

[635] The Income Tax Act, on the other hand, does provide for the procedure as set out earlier but non-compliance with the procedure prescribed by the Income Tax Act is not non-compliance with the Immigration Act. Under s 59A of the Immigration Act, the court is only concerned with procedural non-compliance with the Immigration Act or the Rules made thereunder.

[636] Having admitted that the Passports Act and the Immigration Act do not provide the procedure for imposing a travel ban, learned counsel then asked the question: Does this mean that the respondents can rely on a general provision such as ss 3(2) and 4 of the Immigration Act to impose a travel ban premised on untrammelled discretion? He answered the question by saying that this simply cannot be the intention of the Legislature — to give the respondents unlimited discretionary power by contrasting it with Parliament explicitly providing for a travel ban in the Income Tax Act on citizens and concomitantly prescribing elaborate and stringent conditions for its implementation.

[637] With due respect, the comparison drawn by learned counsel between the Immigration Act and the other two Acts is of no help in determining whether the Director General had been guilty of procedural non-compliance for purposes of s 59A of the Immigration Act. Section 2 of the Passports Act merely provides for the production of passports by every person upon entry to or departure from Malaysia. This has nothing to do with any breach of any procedural requirement by the respondents in imposing a travel ban under the Immigration Act or the rules made thereunder, which is the point that the appellant is trying hard to drive home.

[638] As for the procedure prescribed by the Income Tax Act, likewise the question of procedural non-compliance by the Director General of Immigration does not arise as the travel ban that was imposed on the appellant was not issued pursuant to a request by the Director General of Income Tax under s 104(1) of the Income Tax Act. The Director General of Immigration was exercising his power under s 3(2) of the Immigration Act and not in compliance with such request by the Director General of Income Tax when he imposed the travel ban.

[639] The issue therefore boils down to the question whether the respondents could rely on the general provisions of s 3(2) of the Immigration Act to impose the travel ban on the appellant, in the absence of any specific procedure prescribed by the Immigration Act. Section 40(1) of the Interpretation Acts 1948 and 1967 in my view gives the Director General of Immigration an implied power to impose the travel ban. The subsection reads:

> 40 Implied powers
>
> (1) Where a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.'

[640] The Director General of Immigration must have such implied powers for otherwise how is he to enforce his powers, duties and responsibilities under the Immigration Act, the Passport Act and the Income Tax Act?

[641] I do not think the maxim *unious est exclusion alterius* invoked by the appellant has any application to the facts of the present case. The maxim cannot be applied simply by comparing the Income Tax Act (which prescribes the procedure) with the Immigration Act (which does not). They are not 'one or more things of the same class'. The Immigration Act and the Income Tax Act deal with completely different areas of the law and the Director General of Immigration only comes into the picture when there is a request for a travel ban by the Director General of Income Tax under s 104(1) of the Income Tax Act. The Income Tax Act has nothing to do with matters relating to immigration in as much as the Immigration Act has nothing to do with matters relating to income tax.

[642] It was further submitted that the Minister or the Director General cannot rely on s 3(2) to justify the travel ban because it alters the legal position in a drastic manner and impairs a person's fundamental right to free speech and expression under art 10(1) of the Federal Constitution.

[643] It was argued that even if the Minister or the Director General of Immigration have the general power to impose the travel ban under the Immigration Act or the Passports Act, they have acted in excess of such power and their action fails the proportionality test as laid down by this court in *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301; [2009] 5 CLJ 631 (*Lee Kwan Woh*) where this court accepted the following statement of the Court of Appeal in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213; [2007] 1 CLJ 19:

> The effect of art 8(1) is to ensure that legislative, administrative and judicial action is objectively fair. It also houses within it the doctrine of proportionality which is the

test to be used when determining whether any form of state action (executive, legislative or judicial) is arbitrary or excessive when it is asserted that a fundamental right is alleged to have been infringed. See, *Om Kumar v Union of India* AIR [2000] SC 3689.

[644] The issue raised in question 1 had in fact been considered and determined by the former Federal Court in *Loh Wai Kong*. One of two constitutional issues (the other being whether a citizen has a right to a passport) raised for the court's determination in that case was whether the learned High Court judge erred in law in holding that the expression 'personal liberty' in art 5(1) of the Federal Constitution included the right of a person, whether a citizen or non-citizen of Malaysia, to enter or leave the country whenever he desired to do so.

[645] To travel overseas, the respondent *Loh Wai Kong* needed a passport, which he did not have. In our case, the appellant already had a valid passport at the time the travel ban was imposed on her. The question is whether travelling abroad is her right in law. The former Federal Court answered the question in the negative. Suffian LP delivering the judgment of the court said:

> These three arguments raise the following issue: does a citizen have a right to leave the country, to travel overseas, and a right to a passport?
>
> Article 5(1) speaks of personal liberty, not of liberty simpliciter. Does personal liberty include the three liberties? It is well-settled that the meaning of words used in any portion of a statute — and the same principle applies to a constitution — depends on the context in which they are placed, that words used in an Act take their colour from the context in which they appear and that they may be given a wider or more restricted meaning than they ordinarily bear if the context requires it. In the light of this principle, in construing 'personal liberty' in art. 5(1) one must look at the other clauses of the article, and doing so we are convinced that the article only guarantees a person, citizen or otherwise, except an enemy alien, freedom from being 'unlawfully detained'; the right, if he is arrested, to be informed as soon as may be of the grounds of his arrest and to consult and be defended by his own lawyer; the right to be released without undue delay and in any case within 24 hours to be produced before a magistrate; and the right not to be further detained in custody without the magistrate's authority. It will be observed that these are all rights relating to the person or body of the individual, and do not, in our judgment, include the right to travel overseas and to a passport. Indeed freedom of movement is dealt with specifically in art 9 which, however, only guarantees the citizen (but not the non-citizen) the right to enter Malaysia, and, subject to the special immigration laws applying in Sabah and Sarawak and to other exceptions set out therein, to move freely within the Federation and to reside anywhere therein. With respect, we agree with what Mukherjee J said at p 96 in *Gopalan* AIR 1950 SC 27:
>
> > In ordinary language, 'personal liberty' means liberty relating to or concerning the person or body of the individual, and 'personal liberty' in this sense is the antithesis of physical restraint or coercion. According to Dicey, who is an acknowledged authority on the subject, 'personal liberty' means a personal right

A not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification: vide Dicey on Constitutional Law, 9th Edn, pp 207,208. It is, in my opinion, this negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty.

B While the constitution by art 9 expressly gives the citizen, subject to the limitations set out therein, freedom to move freely within the country and to reside anywhere in it, it is silent as to the citizen's right to leave the country, travel overseas and have a passport for that purpose, and accordingly, *in our judgment, the citizen has no constitutional right to leave the country and travel overseas. Indeed, as to the latter how* C *can the constitution guarantee a right to be enjoyed outside the jurisdiction? The right to travel to foreign countries does not exist in international law but is governed by treaties, conventions, agreements and usage of different kinds, and it would be presumptuous and futile of our constitution-makers to confer a fundamental right which every foreign country may lawfully reject*.

D *Does a citizen have a fundamental right to leave the country with or without a passport? In our judgment no such right is guaranteed by the constitution* and Mr Jag-Jit Singh was with respect correct in saying that in certain circumstances the Government has power to stop a citizen (or indeed even a non-citizen) from leaving; certainly when, as in this case, there is a criminal charge pending against him. *It is impossible and* E *undesirable to catalogue the other circumstances in which the Government may stop a person from leaving, and each case will have to be considered in the light of its own facts*. (Emphasis added.)

[646] The case answers the question whether it is a right for a citizen to travel F overseas, and to a passport. By parity of reasoning, if it is not a right for a citizen to travel overseas, it cannot be a breach of the law for the respondents to impose a travel ban on a citizen. And to say that the Director General of Immigration has no power to impose a travel ban under s 3(2) of the Immigration Act as contended by the appellant is to go too far and is plainly wrong. Nor would he G be acting in excess of the limits of his power under s 3(2) of the Immigration Act by imposing a travel ban.

[647] In *Pua Kiam Wee v Ketua Pengarah Imigresen Malaysia & Anor* [2018] 6 MLJ 670; [2018] 4 CLJ 54 the Court of Appeal ruled that the broad H supervision powers of the Director General under s 3(2) of the Immigration Act encompasses the power to bar a holder of a Malaysian passport from travelling abroad on appropriate ground. In dealing with the appellant's contention that there is no provision in the Immigration Act which allowed the first respondent to bar the appellant from leaving Malaysia, Idrus Harun JCA I (now Attorney General) who wrote the judgment of the court said:

However, the point in the contention of the appellant is that the respondents fail to state the source of power in coming to the decision and that there is no provision in law which allows the first respondent to bar the appellant from leaving Malaysia. Learned counsel contended that the term 'procedural requirements' includes

jurisdictional requirements citing in support thereof the case of *Anisminic Ltd v Foreign Compensation Commission and another* [1969] 2 AC 147 which held that 'if Parliament has enacted that provided a certain situation exists then a tribunal may have certain powers, it is clear that the tribunal will not have those powers unless the situation exists.' The ouster clause in s 59A therefore does not apply as the decision of the first respondent is not within the jurisdiction of Act 155 and the first respondent consequently could not have exercised his powers thereunder.

> [12] It is enough, when dealing with this contention, to say that by virtue of s 3(2) of Act 155, the first respondent has the necessary power to bar the appellant from leaving Malaysia. Section 3(2) of Act 155 is couched in broader terms as to vest powers in the first respondent to have the general supervision and direction of all matters relating to immigration throughout Malaysia. For convenience, we quote s 3(2) of Act 155 below:
>
> 3 (2) The Director General shall have the general supervision and direction of all matters relating to immigration throughout Malaysia.

It seems to us, there can be little doubt that the decision to impose a ban on the appellant from going abroad for the reason that he is under police investigation surely relates to immigration matters under Act 155. *We agree with the learned judge that the words 'and direction to all matters relating to immigration' in s 3(2) are readily capable of being construed to include a decision barring the appellant on appropriate ground from leaving the country*. Therefore, when this court is called upon to determine the validity of the impugned decision, we are satisfied that the attempt by the appellant to persuade us to hold that the first respondent has acted without jurisdiction is completely untenable'. (Emphasis added.)

[648] The appellant's application for leave to appeal to this court against the decision was refused. Learned counsel for the appellant submitted that the High Court's reliance on *Loh Wai Kong* was erroneous as the learned judge failed to consider the intertwined nature of this case, that the respondents' action is predominantly an assault on freedom of speech and expression under art 10(1) of the Federal Constitution, since the internal circular on which the travel ban was imposed purported to create an offence against the right to freely express one's view, including criticising the government of the day.

[649] It was pointed out that under art 10(2) of the Federal Constitution, only Parliament and not the Executive may restrict freedom of speech, citing *Dewan Undangan Negeri Kelantan & Anor b Nordin bin Salleh & Anor* [1992] 1 MLJ 697; [1992] 1 CLJ Rep 72. Such restrictions according to learned counsel are only valid if they fall under the permissible restrictions under art 10(2) ie 'public order or morality' or 'in the interest of the security of the Federation or any part thereof': *Nordin Salleh* and *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751; [2015] 8 CLJ 921.

[650] The appellant's contention was that her freedom of speech and assembly had been breached by the respondents by being:

(a) punished with a travel ban of up to three years; and

(b) prevented from exercising her freedom of speech in the Gwangju Human Rights Award ceremony in South Korea.

[651] Learned counsel relied heavily on the decision of this court in *Lee Kwan Woh* where Gopal Sri Ram FCJ delivering the judgment of the court interpreted 'personal liberty' as including other rights such as the right to travel abroad. It was an affirmation by the learned judge of an earlier decision of the Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771 where, in delivering the judgment of the court in his capacity as a Court of Appeal judge, the learned judge held:

> ... the expression 'life' does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the rights to seek and be engaged in lawful and gainful employment ...

[652] *Loh Wai Kong* was dismissed by *Lee Kwan Woh* as 'worthless as precedent'. Learned counsel however conceded that a later decision of this court in *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal* [2016] 2 MLJ 309; [2016] 4 CLJ 12 held otherwise. In adopting *Loh Wai Kong*, this is what Raus Shariff PCA (as he then was) said by way of *obiter* in delivering the majority decision of the court (Suriyadi Halim Omar and Zaharah Ibrahim FCJJ dissenting):

> [149] A quick scrutiny of those nine articles show that each and every article, as articulated in them, has a peculiar role and purpose. I therefore am inclined to adopt the approach of Suffian LP in *Government of Malaysia & Ors v Loh Wai Kong* that art 5 is meant to deal with issues of personal liberty only. It should not import certain other rights, say, as elucidated above, a right to a passport or right to travel. Such rights are more akin to privileges than rights of life or personal liberty matters, which are more suitable to fall under art 9. On that premise, with her personal liberty never compromised or in danger, I hold that the issue of livelihood in relation to her being denied admission as a peguam syarie falls outside the ambit of art 5. Article 5 thus is of no help to the respondent.

[653] In view of the conflicting decisions of this court, learned counsel said there is a 'crying need' to resolve this question: whether 'personal liberty' under art 5(1) of the Federal Constitution should be given an expansive or narrow interpretation.

[654] Like the fate that the appellant said should befall *Sugumar Balakrishnan*, it was urged upon us that 'the time is ripe' to review *Loh Wai Kong* in the light of subsequent apex court decisions which clearly set out the need to interpret the Federal Constitution *sui generis*, generously and liberally, taking into account the present day conditions.

Reliance was again placed on *Alma Nudo Atenza*, which was also cited in support of the argument that the respondents had acted in excess of their powers as their action was disproportionate to the object of the Immigration Act.

[655] It was submitted that the administration of any immigration and passport legislation must accord with fair norms and be free from extraneous pressure. It was alleged that s 59A of the Immigration Act is 'oppressive'. I will give an immediate answer to this allegation of oppression by referring to Raja Azlan Shah FJ's statement in *Loh Kooi Choon*. This is what His Lordship said:

> Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the Legislature, and not the courts; they have their remedy at the ballot box.

[656] It was submitted that in this globalised world of borderless communication, it would be a severe impairment of a citizen's right to travel, as travelling abroad has now become a norm necessitated by imperative needs rather than a privilege and that as we emerge into the 21st Century we should shed rulings 'reminiscent of a bygone era'.

[657] The contention was that the right to travel interfaces with other constitutional rights, such as the right to freedom of speech and expression, which are inextricably linked, citing *Maneka Gandhi*. Here again, the emphasis is on 'basic structure' of the Federal Constitution, now extended to the right to travel abroad to deliver a speech.

[658] It needs to be pointed out that this court in *Sugumar Balakrishnan* disagreed with the view held by Gopal Sri Ram JCA (at the Court of Appeal stage of the case) that the words 'personal liberty' should be generously interpreted to include all those facets that are an integral part of life itself and those matters which go to form the quality of life. The court then went on to say:

> We are of the view that other matters which go to form the quality of life has been similarly enshrined in Part II of the Constitution under 'FUNDAMENTAL LIBERTIES' *viz*, protection against retrospective criminal laws and repeated trials (art 7); equality (art 8); freedom of speech, assembly and association (art 10); freedom of religion (art 11); rights in respect of education (art 12) and rights to property (art 13).

[659] *Majlis Agama Islam Wilayah Persekutuan* is the third decision of this court, after *Sugumar Balakrishnan* and *Loh Wai Kong*, that the appellant wants to be overruled after *Loh Kooi Choon* was discarded by *Sivarasa Rasiah* in 2010. This court must think long and hard before acceding to such request, and I do not think it is fair to describe *Loh Wai Kong* as a decision that is 'reminiscent of

a bygone era'. The reasoning behind the decision is as applicable now as it was then. It was strictly a legal reasoning that has no relation to any time gap between now and then.

[660] In any event, that part of the decision in *Lee Kwan Woh* which dealt with the issue of 'personal liberty' was made by way of *obiter* as the court was not called upon to determine the issue. *Lee Kwan Woh* was a criminal case and the issue for the court's determination was whether the trial judge had violated the appellant's constitutionally guaranteed right to a fair trial by virtue of art 5(1) of the Federal Constitution and secondly, whether the trial judge had failed to judicially appreciate the evidence.

[661] It was only *en passant* that Gopal Sri Ram FCJ touched on the issue of personal liberty. *Lee Kwan Woh* is therefore not authority for the proposition that 'personal liberty' includes other rights such as the right to travel abroad. That is not the ratio decidendi of the case.

[662] And so is *Majlis Agama Islam Wilayah Persekutuan*, as the majority's view on the issue of 'personal liberty' was also made in passing and therefore has no binding effect as a precedent. The issue in that case was whether a non-Muslim could be admitted as a *Peguam Syarie* to represent parties in any proceedings before the Syariah Court in Wilayah Persekutuan, Kuala Lumpur. The court was not called upon to decide on the right of any person to travel abroad.

[663] Therefore, the authority on the right to travel abroad is still *Loh Wai Kong* and not *Lee Kwan Woh* or *Majlis Agama Islam Wilayah Persekutuan*. For the reasons proffered by Suffian LP in *Loh Wai Kong*, I will, with respect, accept the exposition by the learned LP as good law notwithstanding counsel's contention that the decision in that case was made without jurisdiction on the ground that the appeal was made by the winning party instead of the losing party. Whatever may be the status of the case as precedent, the fact remains that the constitutional issue of whether it is a right for a citizen to travel abroad was raised and fully argued by the parties and decided upon by the court. The decision was therefore in direct answer to the question posed for the court's determination. In fact, by arguing that the High Court in the present case had wrongly applied *Loh Wai Kong*, counsel for the appellant impliedly accepts that the case is still good law except that it has no application to the facts and circumstances of the present case.

[664] Further, I do not think it is appropriate for the appellant to bring in the issue of freedom of speech in making the argument that it was her legal right to leave the country. The right to free speech is too remotely related to the question whether she had a right to leave the country to travel overseas and to

the question whether s 59A of the Immigration Act is constitutional.

[665] To recapitulate, the appellant's case was that the travel ban imposed on her interfered with her freedom of speech and expression under art 10(1) of the Federal Constitution. The respondents' answer to that assertion is that public interest dictates that the act of deriding one's own country is demonstrably undesirable, thus justifying the imposition of the travel ban.

[666] The peculiar facts of this case may not support the reason given by the Director General to impose the travel ban but the principle is far more important for this court to ascertain, ie whether the Director General of Immigration is empowered by s 3(2) of the Immigration Act to impose a travel ban on a citizen and whether the decision is subject to a right of hearing under s 59 and subject to judicial review under s 59A.

BASIC STRUCTURE DOCTRINE VS ART 4(1)

[667] I venture to think that the better way of resolving constitutional conflicts arising from the enactment of post-Merdeka laws by Parliament is to stick to the dispute resolution process inherent in art 4(1) of the Federal Constitution rather than to factor in the basic structure doctrine, which works on the basis that Parliament amends the constitution and the amendment destroys its 'basic structure' (*Kesavananda Bharati*) or a variation of it (*Maneka Gandhi*) which requires a mere 'violation' of the 'basic structure' of the constitution as a basis to strike down any post- Merdeka law. Article 4(1) of the Federal Constitution says:

> This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

[668] It is relevant to note that the drafters of the Federal Constitution had originally used the word 'repugnant' instead of 'inconsistent' in the draft arts 3 and 4 but finally settled for the word 'inconsistent' as it exists in the present form.

[669] Article 4(1) is unique to the Federal Constitution and is not found in the Indian Constitution. That probably is the reason why the Indian Supreme Court in *Kesavananda Bharati* had to devise an ingenious mechanism in the form of a basic structure doctrine to curtail the power of the Indian Parliament to pass laws that destroy the basic structure of the Indian Constitution. As I have alluded to earlier, in Malaysia that safeguard is entrenched in art 4(1) of the Federal Constitution.

[670] By recourse to this article, there is only one issue that needs to be resolved by the court, and that is whether the post-Merdeka laws are 'inconsistent' with the Federal Constitution. If they are, then the laws are void to the extent of the inconsistencies. There is no necessity to determine if they 'destroy', 'violate' or 'offend' the 'basic structure' of the Federal Constitution. This is not a mere matter of terminology, or of form rather than substance. These words give a different colour to the word 'inconsistent' in art 4(1) of the Federal Constitution.

[671] The dispute resolution by recourse to art 4(1) is also made easier by the fact that the article makes no distinction between what is 'basic' and what is not 'basic' in the whole structure of the Federal Constitution. As long as the impugned law is inconsistent with the Federal Constitution, it is liable to be struck down as being unconstitutional.

[672] To be 'inconsistent with this Constitution' simply means to be incompatible with the relevant articles of the Federal Constitution. In the context of the present case, the question is whether s 59A of the Immigration Act is incompatible with art 121(1) of the Federal Constitution.

[673] To succeed in rebutting the presumption of the constitutionality of s 59A of the Immigration Act, all that the appellant needs to do is to show that the provision is inconsistent with the terms of art 121(1) and if so, how is it inconsistent with those terms.

[674] There is no necessity for the appellant to show, and for the court to determine, if art 121(1) is or is not a 'basic structure' of the Federal Constitution and whether s 59A of the Immigration Act has 'destroyed', 'offended' or 'violated' its basic structure by violating the doctrine of separation of powers. These three words are more compatible with the word 'repugnant' originally used by the framers of the Federal Constitution in the Draft arts 3 and 4 but which was rejected and remains absent in the Federal Constitution.

[675] It bears repetition that *Sivarasa Rasiah*, *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza* are not cases on the constitutionality of laws passed by Parliament under art 159 of the Federal Constitution to destroy its basic structure. They are cases on the constitutionality of ordinary post-Merdeka laws which were held to be void for violating the basic structure doctrine by violating the doctrine of separation of powers and therefore void under art 4(1).

[676] The three cases are distinguishable from *Loh Kooi Choon* in that by an Act of Parliament, the Federal Constitution in *Loh Kooi Choon* was amended to deprive Loh Kooi Choon of his right of habeas corpus, which was alleged to

have destroyed the basic structure of the Federal Constitution. Similarly, in *Kesavananda Bharati*, the case that gave birth to the basic structure doctrine. That case dealt specifically with an amendment to the Indian Constitution that destroyed its basic structure. It was not a case on the effect of an ordinary law on the basic structure of the Indian Constitution.

[677] Likewise in the case before us, the issue is simply whether s 59A of the Immigration Act, being an ordinary post-Merdeka law, is void under art 4(1) for being inconsistent art 121(1) of the Federal Constitution. To factor in a doctrine that leaves wide open what constitutes 'basic structure' in the dispute resolution process will only muddy the issue. Even if the basic structure doctrine applies, it will not help the appellant's case as its most basic element — amendment to the Federal Constitution — is missing.

[678] It is ironical to say the least that having strenuously argued that Parliament has no power to alter the basic structure of the Federal Constitution by operation of the basic structure doctrine, the appellant is now urging this court to recognise the 'evolutionary nature' of the Federal Constitution 'to accord with contemporary values and progress'.

[679] The appellant even referred us to a case that is unfavourable to her, namely *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97; [2004] 2 CLJ 265. In that case, this court approved Lord Bingham's statement in *Reyes v The Queen* [2002] 2 AC 235 which was also referred to in the case I have cited earlier, namely *Director of Public Prosecutions of Jamaica v Mollison* (see para 609 above) where the Law Lord said, 'a constitution is not trapped in a time-warp but must evolve over time to reflect the developing needs of society'. It would appear that the appellant is breathing fire and ice over the issue.

PARLIAMENTARY SUPREMACY

[680] The basic structure doctrine that *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza* applied flowed from *Sivarasa Rasiah*, the case that introduced the basic structure doctrine into our legal system by overruling *Loh Kooi Choon* and then broadening it by applying *Maneka Gandhi*.

[681] I have mentioned earlier in this judgment that one of the reasons why *Sivarasa Rasiah* overruled *Loh Kooi Choon* was because Raja Azlan Shah FJ misdirected himself in failing to appreciate the difference between the power of Parliament in a country where Parliament is supreme and a country like Malaysia where it is the Federal Constitution and not Parliament that is supreme. It will be amiss of me not to say more on the subject.

[682] It is often said that since the constitution is supreme in Malaysia, Parliament cannot make any law it pleases, implying perhaps that in jurisdictions that subscribe to Parliamentary supremacy such as the UK, Parliament can pass any law it pleases.

[683] That, of course, is untrue because in both jurisdictions, any Act of Parliament that does not conform to the law can be declared void by the court. If the power of Parliament and the State Legislatures in Malaysia is limited by the Federal Constitution so that they cannot make any law they please, so too is the power of the UK Parliament, not by a written constitution but by the rule of law so that it too cannot make any law it pleases. If in Malaysia the safeguard is art 4(1) of the Federal Constitution, in the UK it is the common law.

[684] The position in England had been made clear 400 years ago by the judgment of Sir Edward Coke in *Dr Bonham's Case* (1610) 77 ER 646 where he said:

> And it appears in our books, that in many cases, the common law will ... controul Act of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, *the common law will controul it, and adjudge such Act to be void*; and ... saith, some statutes are made against the law and right, which those who made them perceiving, would not put them in execution ... (Emphasis added.)

[685] The common law concept of rule of law is embodied in art 4(1) of the Federal Constitution. But even if art 4(1) is not there in the Federal Constitution, it will be a stretch to argue that the Malaysian Parliament can pass any law it pleases. All branches of the government, both in the UK and in Malaysia are subject to the rule of law, and this of course includes the judicial arm of government.

[686] For this reason, it cannot be correct in my humble view, even without the benefit of hindsight, for *Sivarasa Rasiah* to say that when Raja Azlan Shah FJ in *Loh Kooi Choon* quoted the pronouncement made by Lord Macnaghten in the *Vacher* case, which was made in the context of a country whose Parliament is supreme, His Lordship had seriously misdirected himself on the law in rejecting the basic structure doctrine. Perhaps we can have another look at the pronouncement by Lord Macnaghten which Raja Azlan Shah FJ relied on in the *Vacher* case:

> Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. *But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil*

at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.

[687] It is difficult to see how the above pronouncement of trite principle by Lord Macnaghten can be said to have coloured Raja Azlan Shah FJ's judgment or had so seriously prejudiced his mind that the former Federal Court had fallen into serious error in rejecting the basic structure doctrine propounded by the Supreme Court of India in *Kesavananda Bharati*.

[688] In so far as legislative power is concerned, there is no difference in principle between jurisdictions that subscribe to Parliamentary supremacy and jurisdictions that subscribe to Constitutional supremacy. In both jurisdictions, Parliament subscribes to and is subject to the rule of law.

[689] Therefore, the distinction drawn between the power of Parliament in a country where Parliament is supreme and in a country where the constitution is supreme is a distinction of no significance in so far as it concerns the power of Parliament to enact ouster clauses such as s 59A of the Immigration Act pursuant to the power conferred on it by art 121(1) of the Federal Constitution.

[690] In my view, *Loh Kooi Choon* did not commit any error of law in rejecting the basic structure doctrine. More importantly, the former Federal Court could not have been wrong in deciding that Parliament has power to amend any provision of the Federal Constitution so long as the process of constitutional amendment as laid down in art 159(3) of the Federal Constitution is followed. To rule otherwise would be, in the words of Raja Azlan Shah FJ, to 'cut very deeply into the very being of Parliament'.

[691] If we were to accept the appellant's proposition that ss 59 and 59A of the Immigration Act are void and ought to be struck down on the authority of *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza*, it would mean all of the following:

(a) the doctrine of separation of powers prevails over the doctrine of constitutional supremacy;

(b) it is the judicial arm of the government and not the Federal Constitution that is supreme as the Judiciary can override the constitutional mandate of the Federal Constitution which vests power in Parliament through art 121(1) to enact ss 59 and 59A of the Immigration Act;

(c) art 121(1) is unconstitutional for violating the doctrine of separation of powers;

(d) art 121(1) is void for being inconsistent with art 4(1) of the Federal Constitution;

(e) art 159 of the Federal Constitution is redundant and had been formulated in vain by the framers of the Federal Constitution as Parliament is powerless to amend any 'basic structure' of the Federal Constitution;

(f) all post-Merdeka laws are void if they violate the doctrine of separation of powers, even if they are not inconsistent with art 121(1) of the Federal Constitution; and

(g) all ouster clauses, with the exception of those enacted pursuant to art 149 are void, not for violating art 121(1) of the Federal Constitution but for violating the doctrine of separation of powers.

[692] I am unable to accede to such profound proposition of law which has such far reaching implications. We will be heading in the wrong direction of the law if we were to accept the argument that the doctrine of separation of powers overrides the written terms of the Federal Constitution, the supreme and highest law in the land.

[693] The doctrine of constitutional supremacy does not allow any doctrine of law to take precedence over the written terms of the Federal Constitution. Further, based on the historical antecedent of the Federal Constitution, s 59A of the Immigration Act is not constitutionally objectionable. Therefore, I reject the appellant's argument that s 59A of the Immigration Act is unconstitutional and has 'no leg to stand on' in the light of *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza*.

[694] In the upshot, I hold that ss 59 and 59A of the Immigration Act are not void for being inconsistent with art 4(1) read with art 121(1) of the Federal Constitution. The limitation of the court's review power by s 59A of the Immigration Act falls squarely within the power of Parliament to legislate pursuant to the power conferred on it by art 121(1) of the Federal Constitution and is not in breach of the doctrine of separation of powers, which cannot in any event prevail over the written constitution.

CONCLUSION

[695] For all the reasons aforesaid, my answers to questions 2 and 3 are in the affirmative in that both ss 59 and 59A of the Immigration Act are valid and constitutional. However, on the peculiar facts and circumstances of this case, in particular the reason given by the Director General for imposing the travel ban, which reason turned out to be inappropriate, question 1 has to be answered in the negative, that is, although the Director General has a discretionary power to impose a travel ban on a citizen, the discretion is not unfettered. For that reason, and for that reason only, the appeal is allowed in terms of prayer 4 of the

judicial review application, that is, a declaration that the respondents do not have an unfettered discretion in making the impugned decision. There shall be no order as to costs.

[696] My learned sisters, Rohana Yusuf PCA, Hasnah Mohammed Hashim and Mary Lim Thiam Suan FCJJ, who have had sight of this judgment in draft, concur with the reasons given and the conclusions reached.

Mary Lim FCJ (delivering concurring judgment of the court):

[697] I have read the judgment in draft of my learned brother, Abdul Rahman Sebli FCJ and I agree with the views expressed therein. I have nevertheless decided to add the following.

FINDINGS AND DECISION

[698] For clarity, this is question 1:

Question 1

Whether s 3(2) of the Immigration Acts 1959/63 ('Act 155') empowers the Director General with unfettered discretion to impose a travel ban? In particular, can the Director General impose a travel ban for reasons that impinge on the democratic rights of citizens such as criticising the government.

[699] The respondents claimed that the power to impose travel bans or restrictions is reposed in s 3(2) of Act 155. The appellant on the other hand, urging this court to answer this first question in the negative, argued that this provision is 'a general power only to supervise and to direct' and that it cannot be taken as conferring 'a specific and substantive power on the first respondent to impose a travel ban on citizens or even a power to issue an administrative circular which purports to carry force of law'. This argument is deduced from a plain reading of ss 3(2) and 4 of Act 155 which the appellant submits does not contain any provision which specifically grants the Minister and/or the Director General of Immigration the power to impose travel bans on citizens. The same contention is made in respect of the Passports Act 1966 (Act 150). The natural and ordinary meaning of these provisions do no more than set out the powers of the respondents 'to supervise and to direct immigration matters' and cannot be extrapolated so as to confer wide and untrammelled substantive powers that would include imposing travel bans on citizens.

[700] It was further argued that in any event, these provisions, ss 3(2) and 4 of Act 155 cannot be interpreted as providing for a specific substantive power of imposing travel bans on citizens. The appellant relies on the established

principles of statutory interpretation — see *Bennion's Statutory Interpretation* (7th Ed) pp 81–83; as well as case law — see *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135; and learned authors of administrative law — see *MP Jain's Administrative Law in Malaysia and Singapore* (4th Ed), p 405.

[701] The appellant further argued that there are specific provisions in Act 155 which distinctively stipulate the powers, penalties and procedures for the respondents to deal with various matters such as restrictions on foreigners from entering Malaysia (ss 6, 9, 9A, 10, 12 and 15); restrictions on the manner in which foreigners or foreign vessels depart from Malaysia (ss 17 and 31); restrictions on foreigners remaining in Malaysia (s 15). There are only two provisions dealing with citizens — ss 5 and 66; the former deals with the manner in which a citizen or foreigner enters or departs from Malaysia while the latter provide for restrictions on citizens entering East Malaysian States. There are, of course, the powers to investigative, detain and prosecute both citizens and foreigners, but it is in respect of violations of any of the matters already mentioned — see ss 35, 39 and 51. The appellant argued that none of these provisions contain or may be construed as to provide for a power to impose a travel ban or restriction on citizens; certainly not for the reasons explained by the respondents.

[702] Insofar as the Passports Act 1966 (Act 150) is concerned, the appellant contended that this Act deals only with the power as regard persons leaving Malaysia; but this Act, too, 'stops short of giving the power to bar persons from leaving Malaysia'.

[703] This is contrasted with say, s 104 of the Income Tax Act 1967 (Act 53). In the circumstances of a person about or likely to leave Malaysia without paying the tax or sums set out in s 104(1)(a)–(c), the DG of Income Tax may issue to either the Commissioner of Police or the DG of Immigration, a certificate containing particulars of tax or any unpaid sums or debts with a request for that person 'to be prevented from leaving Malaysia unless and until he pays all that tax, sums or debts or furnish security to the satisfaction of the DG of Income Tax for their payment. On receipt of such request, s 104(2) provides that the DG of Immigration 'shall take or cause to be taken all such measures (including the use of reasonable force and seizure, removal or retention of any certificate of identity and any passport, exit permit or other travel document relating to that person) as may be necessary to give effect' to that request/certificate. Under s 104(3), a notice has to be served personally on the person concerned before the mechanism in s 104 operates. The imposition of the ban to travel is however, subject to judicial review — see *Hamzah HM Saman (Amanah Raya Bhd appointed based on the order dated 17 January 2007 representing the estate of Hamzah HM Saman, deceased) & Ors v Ronald*

Beadle [2010] 6 MLJ 808.

[704] Because both Acts 155 and 150 do not similarly contain such comprehensive, elaborate and stringent provisions on travel ban, the appellant submitted that the respondents thus do not have unlimited discretionary power to do as they wish. More so, by way of an internal circular, as relied on in the facts in this appeal.

[705] The appellant also made the argument that express provisions must be prescribed to effect an alteration or an abrogation of her right to travel — see *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1; *Malayan Banking Bhd v Chairman of Sarawak Housing Developers' Association* [2014] 5 MLJ 169; *Panglima Tentera Laut Diraja Malaysia & Ors v Simathari a/l Somenaidu* [2017] 2 MLJ 14; *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [2020] 1 MLJ 141.

[706] It was also the appellant's submissions that the ban impacted on her freedom of speech and assembly as provided under art 10(2) of the Federal Constitution. Not only were the contents or reasons for the ban not made known to the appellant at the time when the ban was imposed; the events that lie at the heart of the ban had yet to take place. The appellant added that the allegation of 'Memburukkan Kerajaan Malaysia' furthermore could not fall within the permissible restrictions generally understood for art 10(2). The respondents' reliance was said to be 'simply too remote, far-fetched and extremely problematic'. In fact, it was suggested that the respondents had 'unilaterally and without sanction of Parliament created an offence of intending to criticise the Government of Malaysia in the future which warrants punitive measures, in this case, a travel ban'.

[707] In any case, the respondents' action was said to arbitrary, and that it fails the proportionality test in which case, the respondents' action was clearly unconstitutional — see *Alma Nudo Atenza*.

[708] I am proceeding in the order of the questions as posed though it may be suggested that because of the presence of s 59A of Act 155, the court is precluded from dealing with the very first question and that until and unless the third question is answered, the first question cannot be answered.

[709] I start with the strong presumption of constitutionality of ss 59 and 59A of Act 155. In *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116, Eusoffe Abdoolcader SCJ enunciated and applied this principle – that 'there is a presumption — perhaps even a strong presumption — of the constitutional validity of the impugned section with the burden of

proof on whoever alleges otherwise'. This principle and decision were cited with approval and followed by the High Court of Australia in *Commonwealth v Tasmania (Dam Case)* (1983) 158 CLR 1, 165. His Lordship reiterated and applied this same principle in his dissenting judgment in *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119 at pp 129–130; [1988] 1 CLJ Rep 197 at p 211.

[710] In my view, the very sequence of the questions posed by learned counsel for the appellant is in itself a recognition of that principle. The maxim *omnia praesumunutur rite et solemniter esse acta* (all things are presumed to have been done rightly) applies to presume that the provisions of law and the acts carried out by the respondents are valid until established otherwise; especially where the legislation or the act complained of is not *ex facie* bad or null. This was explained in *Penang Development Corporation v Teoh Eng Huat & Anor* [1993] 2 MLJ 97; where Jemuri Serjan CJ (Borneo) examined a line of authorities including *London & Clydeside Estates Ltd v Aberdeen District Council & Anor* [1980] 1 WLR 182; *Calvin v Carr* [1979] 2 WLR 755; *F Hoffmann-La Roche & Co v Secretary of State for Trade and Industry* [1975] AC 295; *Smith v East Elloe Rural District Council* [1956] AC 736; *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815.

[711] In essence, these cases held that even if 'a decision made contrary to the rules of natural justice is void, but that, until it is so declared by a competent body or court, it may have some effect, or existence, in law ...;' that such orders 'will remain as effective for its ostensible purpose as the most impeccable of orders'. In *R v Panel on Take-overs and Mergers, ex p Datafin plc*, Donaldson MR expressed the following view:

> I think that it is important that all who are concerned with take-over bids should have well in mind a very special feature of public law decisions, such as those of the panel, namely, that however wrong they may be, however lacking in jurisdiction they may be, they subsist and remain fully effective unless and until they are set aside by a court of competent jurisdiction ...

[712] One of the reasons for this approach is because of the doctrine of the separation of powers and that the court, as respecter of that doctrine, proceeds on the basis that the Legislature, Parliament, often said to have acted or decided in its wisdom, has seen fit to enact such legislation in those precise terms for whatever its reasons and that those reasons have been debated and have passed both Houses of Parliament and the legislation has obtained Royal Assent to become law or part of the law of this great nation. It is, however, entirely the role and within the sole jurisdiction and power of the courts to give expression to the intention of Parliament as properly discerned from the wordings found in the ouster clause; what exactly is the impact and ambit such clauses — see *Abdul Razak bin Baharudin & Ors v Ketua Polis Negara & Ors and another*

appeal [2006] 1 MLJ 320.

[713] Another reason why this approach is adopted is this — the presence of ouster clauses, finality clauses or even the argument of non-justiciability have never deterred the court from examining any decision, dispute or complaint that is referred to the court. Again, the law reports are filled with high authorities on how these 'barriers' have been treated by the court and that it is really in the narrow area of policy, especially foreign policy and international relationships, public order and security, internal matters taken by the various State Legislative Assemblies, that the court may decline intervention. Even then, it would be after the court has satisfied itself that the subject matter is properly within the jurisdiction of the relevant authority.

[714] The recent decisions of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 (*Semenyih Jaya*), *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 (*Indira Gandhi*) and *The Speaker of Dewan Undangan Negeri of Sarawak Datuk Amar Mohamad Asfia Awang Nassar v Ting Tiong Choon & Ors and other appeals* [2020] 4 MLJ 303; [2020] 3 CLJ 757, amply illustrate this point. See also *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113, and *Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1984] 1 MLJ 363 (*Hotel Equatorial*).

[715] In *Hotel Equatorial*, the Federal Court applied the approach taken in *Anisminic Ltd v Foreign Compensation Commission and another* [1969] 2 AC 147 where the House of Lords held that an ouster clause in the Foreign Compensation Act 1950 did not preclude the courts from reviewing the decisions of the Foreign Compensation Commission on the basis of jurisdiction because such bodies or authorities may be stepping outside their jurisdictions in any number of ways. Lord Pearce explained:

> Such tribunals must, however, confine themselves within the powers committed to them on a true construction of the relevant Acts of Parliament. It would lead to an absurd situation if a tribunal having been given a circumscribed area of inquiry, carved out from the general jurisdiction of the courts, were entitled of its own motion to extend that area by misconstruing the limits of its mandate to inquire and decided as set out in the Act of Parliament. Again, if its instructed to give relied wherever on inquiry it finds that two stated conditions are satisfied, it cannot alter or restrict its jurisdiction by adding a third condition which has to be satisfied before it will give relief. It is therefore, for the courts to decide the true construction of the statute which defines the area of a tribunal's jurisdiction. This is the only logical wat of dealing with the situation and it is the way in which the courts have acted in its supervisory capacity.

[716] In *Hotel Equatorial*, the ouster clause was in s 33B of the Industrial Relations Act 1967 which states in no uncertain terms that the decision of the Industrial Court 'shall be final and conclusive and shall not be challenged, appealed against, reviewed, quashed or called into question in any court'. In clear, unequivocal terms, this was what the Federal Court had to say of such clause:

> It is common ground that such a clause will not have the effect of ousting the inherent supervisory power of the High Court to quash the decision by certiorari proceedings if the Industrial Court has acted without jurisdiction or in excess of the limits of its jurisdiction or if it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity.

[717] This court discussed *Hotel Equatorial* in *Indira Gandhi*, opining at paras [132] and [133] that 'based on the principles in *Anisminic*, the lack of jurisdiction by the registrar renders the certificates issued a nullity. Section 101(2) cannot have the effect of excluding the court's powers of judicial review over the registrar's issuance of the certificates. It is settled law that the supervisory jurisdiction of courts to determine the legality of administrative action cannot be excluded even by an express ouster clause. It would be repugnant to the rule of law and the judicial power of the courts if the registrar's decision is immune from review, even in light of uncontroverted facts that the registrar had no jurisdiction to make such a decision. In any case, the language of s 101(2) itself does not oust judicial review. The section merely states that a certificate of conversion to the religion of Islam shall be conclusive proof of the facts stated therein ...'.

[718] The court may further decline to examine and grant the particular orders or reliefs sought for any number of reasons but to stop the court at the very threshold of scrutiny would be wholly ineffective.

[719] More importantly, it is readily inferred that s 59A recognises and accepts that the jurisdiction of the court may never be ousted as it would offend the supremacy of the Federal Constitution as enshrined in art 4 and as conferred on the court under art 121 and further spelt out in the Courts of Judicature Act 1964 (Act 91), to examine any challenge brought before the court.

[720] These are the terms of s 59A:

> 59A Exclusion of judicial review
>
> (1) There shall be no judicial review in any court of any act done or any decision made by the *Minister or the Director General, or in the case of an East Malaysian State, the State Authority*, under this Act *except in regard to any question relating to*

compliance with any procedural requirement of this Act or the regulations governing that act or decision.

(2) In this section, 'judicial review' includes proceedings instituted by way of —

(a) an application for any of the prerogative orders of *mandamus*, prohibition and *certiorari*;

(b) an application for a declaration or an injunction;

(c) any writ of *habeas corpus*; or

(d) any other suit or action relating to or arising out of any act done or any decision made in pursuance of any power conferred upon the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, by any provisions of this Act ... (Emphasis added.)

[721] It is quite clear from the terms of s 59A that it deals not only with the acts or decisions of the Director General but also those made by the Minister or in the case of Sabah and Sarawak, the relevant State Authority. Further, s 59A deals with matters beyond the right to travel. Hence, any attempt to impugn s 59A must take these serious implications into account.

[722] Section 59A does not seek to prohibit the scrutiny of the court in absolute terms. It serves to limit that scrutiny, 'except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision'. Where the jurisdiction and power of the court is interfered with in absolute terms as was the case in *Semenyih Jaya* where s 40D of the Land Acquisition Act 1960 reduced the role of the court to the 'sideline and dutifully anoint the assessors' decision', the court has no hesitation in striking down such provision as offending the doctrine of basic structure as enshrined within art 4. I will elaborate on this when dealing with the third question. For the same reason, the Federal Court sustained the validity of ss 56 and 57 of the Central Bank of Malaysia Act 2009 in *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561.

[723] I understand ouster clauses such as that presented in s 59A may be similarly found in no less than 100 other pieces of legislation and the effect of striking down such a clause or similar clauses will have far reaching consequences. This is further reason why the court should be slow in striking down provisions of the law on ground of invalidity; that it should only be done in the clearest of conditions and where the presumption of validity leads to no avail and brings injustice; or in this appeal, if it is established that s 59A is inconsistent with art 4 and/or any other provision of the Federal Constitution.

[724] Operating thus from the first position or regime that s 59A is valid and

that judicial review though somewhat circumscribed in the terms prescribed in s 59A, the issue that arises is not so much whether the respondents' power to impose travel bans is unfettered but whether there is any power to impose travel bans at all in the first place. There is no such thing as unfettered power or discretion and any authority, person or body who labours under such serious misconception, must relook at what was said in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 at p 148.

[725] In this first question, the issue thus is whether the respondents, in particular, the 1st respondent/Director General of Immigration can, using his powers under s 3(2) of Act 155 ban the appellant from travelling or departing from Malaysia where the appellant has criticised the government. In this appeal, the appellant asserts that she was only exercising her legitimate right to so criticise the government.

[726] I must further express my view that the approach taken thus far when confronted by such ouster clauses has, with respect, been somewhat literalistic. The term 'procedural requirement' is not defined in Act 155. In my view, that term must include any and all procedure relating to or leading to and governing the impugned decision. The term does not carry a literal or grammarian meaning or construction where the court exercising its supervisory power and jurisdiction of judicial review, merely looks at the 'face' of the decision. The fact that the term 'procedural requirement' is used in relation to what *governs* the act or decision means that it is not a superficial mechanistic exercise but more. It envisages and calls for an examination of the enabling law, what it provides for and whether there has been any non-compliance or excess of the procedure under that enabling law. How can such an exercise be legitimately conducted unless and until the enabling law and its terms properly and validly identified and established. And, in exercising its supervisory jurisdiction as conferred under the Federal Constitution and the Courts of Judicature Act 1964, the courts will use judicial jurisprudence and legal reasoning to examine the impugned decision, to find if the process of fair play as set out in prescribed procedures have been complied with. The *Wednesbury* principles and the doctrine of proportionality are all examples of how the courts exercise its powers of scrutiny. The courts refrain from examining matters of substantive merit, save in the most exceptional cases — see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; where the need to do justice must surely prevail.

[727] Now, given that the appellant only learnt for the first time that she was

banned from travelling abroad on the day of travel and at the KLIA, the logical place to start must be the respondents' explanation for the imposition of the ban. And, since the respondents never replied to the appellant's letter, their affidavit in reply becomes crucial.

[728] In this regard, the respondents' explanation came through an affidavit affirmed by its then Timbalan Ketua Setiausaha (Keselamatan), Kementerian Dalam Negeri (deponent). This is what he deposed:

> 4. Dalam menjawab Affidavit Sokongan Pemohon, terlebih dahulu saya ingin menyatakan secara ringkas latar belakang yang membawa kepada keputusan larangan Pemohon ke luar negara:-
>
> 4.1 Pada 06.01.2016, saya telah memberi arahan melalui Pengarah Bahagian Keselamatan dan Passport agar Pemohon disenarai hitamkan atas KOD NAP KK0057 iaitu 'Kes-Kes Khas' dengan arahan Semua Permohonan Mendapatkan Kemudahan Imigresen Hendaklah Ke Bahagian Keselamatan'
>
> Sesalinan arahan tersebut dilampirkan dan ditanda sebagai 'Eksibit MH-1'.
>
> 4.2 Nama Pemohon telah dimasukkan di dalam Sistem Senarai Syak Jabatan atas alasan tindakan Pemohon yang memburukkan Kerajaan Malaysia melalui forum yang dianjurkan iaitu 'Forum People's Movement Can Bring Change' yang dijadualkan berlangsung pada 07.01.2016. Forum tersebut juga melibatkan seorang aktivis Indonesia bernama Mugiyanto.
>
> 4.3 Pemohon juga terlibat dalam penganjuran Perhimpunan Anti-Trans Pacific Partnership Agreement (TPPA) protes yang dijadualkan pada 23.01.2016 di mana boleh memburukkan kerajaan Malaysia melalui tindakan membantah TPPA menggunakan medium yang salah (perhimpunan haram).
>
> 4.4 Bagi kesalahan memburukkan kerajaan Malaysia, tempoh maksimum penahanan/penangguhan passport adalah selama 3 tahun. Walaubagaimanapun pembatalan/penangguhan tersebut boleh dilakukan pada bila-bila masa atas budi bicara Ketua Pengarah Imigresen Malaysia.
>
> Di antara Kes-Kes Khas untuk penangguhan passport/dokumen perjalanan termasuklah bagi kesalahan-kesalahan kes pengedaran dadah di dalam negara, tiada kebenaran untuk memasuki Isreal, memburukkan kerajaan Malaysia/negara dalam apa bentuk atau cara sekalipun, menjejaskan imej negara di luar negara dan permintaan oleh agensi-agensi yang berkaitan demi kepentingan negara.
>
> ...
>
> 6. Sebagai menjawab perenggan 19 Afidavit Pemohon No. 1, saya sesungguhnya menyatakan bahawa tiada peruntukkan undang-undang yang memperihalkan kewajipan bagi pihak berkuasa untuk memaklumkan kepada mana-mana orang sebelum disekat daripada keluar negara.
>
> 7. Malah adalah menjadi tanggungjawab bagi mana-mana orang untuk menyemak status perjalanan mereka terlebih dahulu sebelum melakukan perjalanan ke luar negara. Di samping itu, Kerajaan telah menyediakan medium yang mudah untuk

A bagi mana-mana orang yang hendak ke luar negara untuk menyemak status melalui Portal Imigresen Semakan Status Kawalan Imigresen untuk warganegara Malaysia (SSPI).

B 8. Merujuk kepada perenggan 20 Afidavit Pemohon No. 1, saya sesungguhnya menyatakan bahawa walaupun seseorang itu telah dikeluarkan passport dalam satu tempoh sah laku (5 tahun) tetapi pada bila-bila masa dalam tempoh berkenaan, passport itu boleh ditahan dari digunakan untuk ke luar negara. Mekanisme yang digunakan adalah dengan memasukkan nama seseorang di dalam Sistem Senarai Syak Jabatan Imigresen mengikut kesalahan dan tempoh penangguhan. Dalam hal ini, kes Pemohon diklasifikasikan di bawah Item 3 dalam Jadual Pekeliling C Imigresen Malaysia Terhad Bil. 3 Tahun 2015.

...

D 12. Seterusnya saya menyatakan bahawa Pemohon telah dimasukkan di dalam Sistem Senarai Syak Jabatan bermula 06.01.2016 lagi. Oleh yang demikian, dakwaan bahawa Pemohon dihalang ke Korea Selatan (untuk menyampaikan ucapan) pada 15.05.2016 di perenggan 33 dan 34 Afidavit Pemohon No. 1 adalah tidak benar memandangkan nama Pemohon telah dihalang daripada ke luar negara sejak 06.01.2016.

E 13. Merujuk kepada perenggan 36 Afidavit Pemohon No. 1, saya menyatakan bahawa pada 17.05.2016, pembatalan nama Pemohon di dalam Sistem Senarai Syak Jabatan telah dikemaskini. Keterangan yang tercatat adalah arahan pembatalan Senarai Syak oleh TPB(H) Tuan Mohummad Hatta bin Kassim pada 17.05.2016 melalui PPI(H) Puan Mazlifah binti Zainal Abidin. Oleh yang demikian, kerisauan yang ditimbulkan tidak berbangkit.

F 14. Merujuk kepada perenggan 37 dan 38 Afidavit Pemohon No. 1 dan saya menafikan bahawah Responden-Responden telah bertindak secara ultra vires dan melanggar hak asasi Pemohon di bawah Perlembagaan. Saya sesungguhnya menyatakan bahawa tindakan yang diambil adalah menurut peruntukan undang-undang yang relevan. Isu yang berbangkit ini akan dihujahkan oleh G Peguam Persekutuan semasa pendengaran permohonan ini.

[729] In summary, the deponent admitted that it was he who had directed for the appellant's name to be blacklisted on the 'Sistem Senarai Syak Jabatan' H under 'KOD NAP KK0057' for 'Kes-Kes Khas' with an instruction that 'Semua Permohonan Mendapatkan Kemudahan Imigresen Hendaklah Ke Bahagian Keselamatan'. And, more significantly, that he had given such instruction not on the appellant's day of travel but as far back as 6 January 2016. The deponent's instructions were accordingly effected.

I **[730]** The deponent elaborated in his affidavit in reply the reasons for his decision, that the appellant's name was blacklisted because she:

(a) disparaged the Government of Malaysia at the 'Forum People's Movement Can Bring Change'; and

(b) was involved in organising an unlawful protest (Perhimpunan Anti-Trans Pacific Partnership) where such protest could disparaged the Government of Malaysia.

[731] Both events for which the appellant was accused of had yet to take place at the time the respondents blacklisted her. The forum was scheduled for 7 January 2016, the day after the deponent gave his instruction while the protest was not till 23 January 2016. No explanation is available as to how this could have come to pass. What is available, is the further explanation that the offence of disparaging the Government of Malaysia carries a suspension of passport for the maximum period of three years. Curiously, all his reasons relate to events that had yet to take place but for unexplained reasons, he already had foreknowledge.

[732] The deponent further averred on behalf of the respondents that there are no legal provisions requiring the respondents to inform the appellant in advance of any restriction of travel overseas; that in any event, the appellant ought to have checked against the department's website for any restriction in travel prior to travelling. The respondents denied that its decision is ultra vires and violates the appellant's fundamental liberties; that on the contrary the respondents have acted in accordance with the relevant law.

[733] More particularly, the respondents claimed that while the appellant may have been issued with a passport, that passport may, at any time, be restrained from being used for travelling overseas. This is through the blacklisting mechanism and as per Pekeliling Imigresen Malaysia Terhad Bil 3 Tahun 2015 ('Circular'). In the case of the appellant, she was classified under item 3 of the Schedule to the circular.

[734] I must point out that the appellant denied the allegations in her affidavit in reply. There was no reply from the respondents.

[735] Given that the blacklisting of the appellant or the impugned decision was made pursuant to the circular, that Circular must be examined in detail and properly. This is the circular with the relevant Schedule B:

PEKELILING IMIGRESEN MALAYSIA TERHAD BIL. 3 TAHUN 2015

TATACARA PENGURUSAN PERMOHONAN PASPORT MALAYSIA ANTARABANGSA (PMA) YANG DILAPORKAN HILANG ATAU ROSAK DAN TEMPOH PENANGGUHAN PASPORT

1. TUJUAN

1.1 Pekeliling ini bertujuan memaklumkan keputusan *Kerajaan* mengenai tatacara pengurusan permohonan Pasport Malaysia Antarabangsa (PMA) gantian bagi kes

kehilangan atau rosak serta tempoh penangguhan pengeluaran PMA baru kepada mereka yang didapati melakukan kesalahan jenayah dalam atau luar negara yang boleh menjejaskan imej negara.

2. LATAR BELAKANG

2.1 Pada masa ini semua permohonan gantian PMA yang dilaporkan hilang atau didapati rosak perlu mengikut prosedur yang telah ditetapkan seperti dinyatakan dalam Pekeliling Imigresen Malaysia Terhad Bil. 2 Tahun 2011.

2.2 Mengikut pekeliling tersebut pemohon tidak perlu membuat laporan polis bagi tujuan memohon PMA gantian bagi kes kehilangan kecuali disebabkan kecurian, rompakan dan ragut.

3. ARAHAN BAHARU

3.1 Semua permohonan untuk mendapatkan PMA gantian bagi kes kehilangan perlu disertakan dengan laporan polis (mandatori). Siasatan akan dijalankan berdasarkan laporan polis yang disertakan semasa memohon PMA gantian.

3.2 Arahan ini juga adalah terpakai bagi kes kehilangan di luar negara iaitu pemohon perlu mengemukakan laporan polis di negara berkenaan sebelum berurusan dengan Pejabat Perwakilan Malaysia bagi mendapat PMA atau dokumen perjalanan gantian.

3.3 Bagi kes kehilangan PMA di luar negara, pemohon tidak perlu membuat laporan polis di Malaysia bagi memohon PMA gantian.

3.4 Bagi kes gantian PMA yang rosak pula, pemohon perlu membawa bersama PMA tersebut semasa membuat permohonan.

3.5 Nombor pasport yang dilaporkan hilang hendaklah dibatalkan dan disenaraihitamkan di dalam sistem Jabatan supaya tidak disalahguna oleh pihak lain. Nombor pasport tersebut akan disalurkan kepada pihak PDRM untuk dimasukkan ke dalam Sistem INTERPOL.

3.6 Pegawai perlu mengingatkan pemohon bahawa *PMA yang telah dilaporkan hilang tidak boleh diaktifkan semula*.

3.7 Bagi melaksanakan keputusan Kerajaan ini, semua Pejabat Imigresen diarah untuk mengambil tindakan berikut:

3.7.1 Tindakan terhadap permohonan PMA yang hilang atau rosak, tempoh penangguhan dan kelulusan seperti di *Lampiran A*.

3.7.2 Tindakan terhadap permohonan bagi yang melakukan kesalahan di dalam dan luar negara, permohonan boleh ditangguh seperti di *Lampiran B*.

3.8 Sekiranya pemohon hadir ke pejabat tanpa menyertakan laporan polis, semakan hendaklah dibuat melalui sistem pasport jabatan dan pegawai perlu mendaftar kes di menu *daftar kes kehilangan*. (Pasport akan terbatal secara automatik). Pemohon dinasihatkan membuat laporan polis untuk proses selanjutnya.

3.9 Butiran pemohon dan pasport yang dilaporkan hilang perlu dicatatkan di *Lampiran C* bagi tujuan rekod.

3.10 Carta Alir bagi proses permohonan kehilangan adalah seperti di *Lampiran D*

4. KEPUTUSAN PERMOHONAN

4.1 Keputusan permohonan gantian PMA atau penangguhan permohonan hendaklah dimaklumkan kepada pemohon dalam tempoh 5 hari bekerja dari tarikh permohonan lengkap diterima.

4.2 Kuasa mempertimbangkan permohonan diberi kepada:-

4.2.1 Pengarah/Timbalan Pengarah Bahagian Keselamatan dan Pasport;

4.2.2 Pengarah/Timbalan Pengarah Imigresen Negeri;

4.2.3 Ketua Bahagian Pasport;

4.2.4 Ketua Imigresen Cawangan;

4.2.5 Timbalan Ketua Imigresen Cawangan jika ketiadaan Ketua Imigresen Cawangan);

4.2.6 Ketua Atase Imigresen; dan

4.2.7 Timbalan Ketua Atase Imigresen jika ketiadaan Ketua Atase Imigresen).

4.3 Sekiranya pemohon membuat rayuan bagi kes penangguhan keputusan penangguhan hanya akan dipertimbangkan oleh *Ketua Pengarah Imigresen Malaysia.*

5. *PEMBATALAN*

Pekeliling Imigresen Malaysia Terhad Bil. 2 Tahun 2011 bertarikh 29 Mac 2011 adalah dibatalkan.

6. *TARIKH KUATKUASA*

Pekeliling ini berkuatkuasa mulai tarikh dikeluarkan.

LAMPIRAN B

TEMPOH PENANGGUHAN PASPORT/DOKUMEN PERJALANAN BAGI YANG MELAKUKAN KESALAHAN

BIL	KESALAHAN	TEMPOH PENANGGUHAN
1.	Terlibat dengan kesalahan kes pengedaran dadah di dalam negara. Nama pemohon terdapat di dalam Senarai Syak Jabatan atas permintaan PDRM	3 tahun atau mengikut keputusan PDRM
2.	Tiada mendapat kebenaran dari Kementerian Dalam Negeri untuk memasuki Israel	3 Tahun
3.	Memburukkan kerajaan Malaysia/negara dalam apa bentuk atau cara sekalipun.	3 Tahun

4.	Menjejaskan imej negara di luar negara kerana ditangkap dan dikenakan tindakan undang-undang serta dihantar pulang kerana: i. Melakukan jenayah ii. Tinggal lebih masa; dan iii. Bekerja tanpa permit yang sah.	3 Tahun

[736] Having scrutinised the respondents' explanation and the circular, I find that both the explanation and the circular suffer from several fatal flaws.

[737] Dealing first with the circular and again operating on the principle of presumption of validity, that the circular is valid and has force of law, it is quite clear from its own terms that it does not authorise the respondents to blacklist the appellant whether for the reasons proffered or at all. Second, the circular is invalid.

[738] On the first ground, the circular deals with how applications for replacement international passports which are lost or damaged are to be managed; and for the period of suspension of issuance of a new international passport to those who have committed criminal offences both within and outside the country which may jeopardise the image of the country. This is evident from the description of the circular itself and from its para 1.1.

[739] In the case of passports which have been lost or stolen, the passport number will be revoked and blacklisted in the respondents' system so that it will not be wrongly used by others — see para 3.5. Such details will also be forwarded to the police for inclusion in INTERPOL's system. This makes perfect sense and understandably serves to protect the holder of the passport whose passport has been stolen from wrongful use. The appellant's case does not fall under this scenario.

[740] In the second situation where the holder of the passport has committed some criminal offence whether within or outside Malaysia, following from para 1.1, the issuance of a new passport may be suspended. See para 3.7.2 — 'permohonan boleh ditangguh seperti di Lampiran B'.

[741] Again, the appellant's case does not fall within this scenario as she was not applying for another new international passport such that a new passport may not be issued to her for the relevant period, depending on the circumstances as set out in Lampiran B. The circular thus does not apply to the appellant.

[742] Consequently, on the strength of the respondents' own Circular, the

impugned decision is clearly invalid and offends its own procedural requirements and an order of certiorari ought to have been granted to quash the said decision. However, since the respondents have themselves removed the appellant from the blacklist even before the application for judicial review was filed but this was not known till later, then the appropriate order would be the grant of a declaration that the respondents have acted in excess of jurisdiction.

[743] On the second ground, I am of the firm view that the circular is in any event invalid. There are several reasons for this conclusion.

[744] In order to answer the question of compliance with the procedural requirements, be it of the principal Act or any Regulations made under the principal Act, the source of the power to issue the circular must be examined. In this respect, the circular gives no indication of its source of enabling power; whether it be pursuant to Act 155 or Act 150. Further, even if this was a drafting flaw, neither legislation empowers the respondent, in particular the first respondent from issuing such circulars having a force of law to have the reaches that it did in the case of the appellant. At best, such circulars are only administrative and for internal use with no force of law at all.

[745] Although the learned SFC had conceded that the circular is issued under Act 155, with respect, that concession including the appellant's acceptance, is not determinative. I am of the view that it is incumbent on the court to carefully examine both Act 155 and 150 in order to determine first, which is the applicable law; and second, if there is some enabling power to make such circulars.

[746] In my view, Act 155, the Immigration Act, actually has no application and its reliance is misplaced. To a large extent, this is in fact the argument of the appellant; that Act 155 does not provide for matters of the nature contemplated by the respondents. Although the appellant was making the submission from the perspective of express power to impose travel bans, the primary argument of the appellant was that Act 155 does not provide for or govern the matters claimed by the respondents. In this respect, I agree.

[747] Act 155 deals with immigration. There are seven Parts in Act 155. Putting aside the Special Provisions for East Malaysia in Part VII (ss 62–74), and save for s 5, this Act deals with admission or entry into the country — Part II; the applicable and required documentation and procedure for such valid entry — Parts III and IV; removal of prohibited and illegal immigrations or persons who have unlawfully remained in the country — Part V; and the relevant powers related to such matters including powers of arrest and detention of the persons mentioned in Part V–Part VI.

[748] I have singled out s 5 in Part II as it is the only provision dealing with entry into or departure from the country that would be applicable to the appellant, as a citizen although ss 6 and 7 deal with the appellant's right, as a citizen, of entry into Malaysia, without a permit or pass, as defined under Act 155. The remaining parts of Act 155 do not apply to her including ss 9, 9A which empower the Director General of Immigration to prohibit entry or limit entry into Malaysia where he 'deems it expedient to do so in the interests of public security, or by reason of any economic, industrial, social, educational or other conditions in Malaysia'. In fact, the proviso to both these provisions expressly provide that any order made by the DG pursuant to these provisions 'shall not apply to any citizen'.

[749] It also becomes apparent that Act deals more with matters of entry and arrivals into Malaysia of non-citizens and how unlawful entries of such persons or persons without the necessary travel documentation, the substantial part of Act 155 has nothing really to do with her. As a citizen, the appellant is expressly guaranteed a right of entry without restrictions. So, the only provision relevant for the purpose of this appeal and which may be applicable to the appellant is on her right to depart from Malaysia. This is where s 5 of Act 155 comes in.

[750] Insofar as s 5 is concerned, it seeks not to provide that the appellant, as a citizen has a right to depart from Malaysia. Instead, it provides for the prescription and declaration by the Minister of 'approved routes' and 'such immigration control posts, landing places, airports or points of entry'. All entry and departure from the country must be through or from such declared points of entry. In other words, it is appellant's point of departure from Malaysia that is controlled by Act 155 and not her right to depart. In fact, Act 155 does not regulate the right of the appellant, as a citizen to depart from Malaysia save in respect of *where* the departure must take place. In the case of the appellant, it is not in dispute that on the fateful night, she was departing from a designated and declared point of entry or immigration control post, namely KLIA.

[751] Since Act 155 does not regulate the right to depart and by implication, the right to travel, then the circular which claims to have its source of validity under this Act, is simply invalid. The compliance of any procedural requirement must necessarily refer to valid procedures that are enacted under the Act or the Regulations made thereunder. As Act 155 does not restrict the right to depart and to travel, there can be no Regulations made for such purpose; and if there are, its validity would be in serious doubt. The circular would be in an even worse or more precarious position.

[752] The respondents attempt to argue that the circular and thereby the ban or blacklisting of the appellant and/or passport was pursuant to the powers set out in s 3(2) of Act 155. This provision states that the Director General of

Immigration 'shall have the general supervision and direction of all matters relating to immigration throughout Malaysia'. In my view, this power of supervision and direction may only be properly exercised in relation to matters already prescribed by Act 155 or by the Regulations made under Act 155. It may also extend to matters under Act 150 since both pieces of legislation come under the purview of the Director General of Immigration and are necessarily related. It cannot be in relation to matters outside Act 155 or Act 150, certainly not on matters governed by other legislation unless of course there are specific powers to that effect under those laws. Such general powers of supervision and direction even of all matters relating to immigration cannot, by any stretch of imagination, extend to a power, whether implied or express, to ban travel by citizens for reasons which are unrelated to immigration or passports, as we see in this appeal, that is, purportedly for scandalising or ridiculing the government, a matter which does not come within the purview of the original powers of the Director General of Immigration. The affidavit deposed by the Director General of Immigration does not indicate that he acted on the instruction of some other authority; rather it was entirely his decision; seeming to suggest a misconception that he has the power to regulate such behavior or conduct, which he does not.

[753] As I have attempted to show, Act 155 does not contain any provision regulating departure by citizens save in the manner as set out in s 5. Thus, the Director General of Immigration's powers of general supervision and direction in s 3(2) can only be in relation to s 5 and that is only on the matter of point of entry or immigration control posts; and cannot extend its reaches beyond those limits.

[754] The scrutiny, however, does not stop there. As I had said at the outset, the correct legislation must be identified; and if after the whole exercise, there is none, then the whole decision is a nullity. The appellant was unable to travel on 15 May 2016 because her document of travel, her valid passport, rightly or wrongly, had been blacklisted. It was not because, nor has it ever been suggested that she was departing Malaysia from an undeclared point of entry/departure.

[755] Since the appellant's departure was hindered or barred by reason that her document of travel, that is, her international passport had been blacklisted, Act 155 thus has no application. The relevant law on passports is the Passports Act 1966 (Act 150), an Act 'relating to the possession and production of travel documents, by persons entering or leaving, or travelling within, Malaysia, and to provide for matters connected therewith'.

[756] I am fortified when the circular is examined, that it clearly deals with passports, whether replacement or new passports. Hence in my opinion, the proper legislation must be Act 150 and not the Act 155 which deals with

immigration matters. Aside from suffering from being unable to meet the terms of the circular itself, as already explained, Act 150 too, does not allow for the issuance of such circulars. I shall return to this point later.

[757] Under s 1 of Act 150, a 'passport' is defined to mean 'a valid passport which has been issued to a person by or on behalf of the government of which he is a subject o or citizen and includes any form of valid document of identity issued for the purpose of travel by any Government and recognised as a travel document by the Government of Malaysia'. Pursuant to s 2(2), every person, including the appellant, 'leaving Malaysia for a place beyond Malaysia shall, if required so to do by an immigration officer produce to that officer a passport'. And, under s 2(3), an immigration officer may, in relation to any passport produced under this section, put to any person producing that passport such questions as he thinks necessary; and the person shall the questions truthfully'. Under s 2(4), an immigration officer 'may make on any passport produced under this section such endorsement as he thinks fit'.

[758] Thus, it would appear that s 2 of Act 150 empowers the immigration officer to endorse as he thinks fit on the passport of any person, citizen or non-citizen, following from questions put and answers given.

[759] Two points arise here. First, while the immigration officer may endorse as he thinks fit, it is not an unfettered discretion. The endorsement or the exercise of the power under s 2 is always open to challenge and scrutiny by the courts. Second, such endorsements in any case, logically, may only take place at the time of entry or in the case of the appellant, at the time of departure. It would be reasonable and also fair to say that the endorsement may extend to a prohibition of entry or departure or such similar remark. Again, it may only be lawfully endorsed at the time of presentation of passport, and only upon questions put and any answers given.

[760] While the respondents may have entered the appellant's name into its list, it is her passport and its details that are entered so that the respondents may control her movement into and from the country.

[761] But, as volunteered by the respondents, the endorsement or the blacklist was not affected at the time of departure on 15 May 2016 by the relevant immigration officer at KLIA. Instead, it was entered on 6 January 2016, in clear violation of the terms of s 2 of Act 150. Thus, the endorsement is for this other reason, invalid.

[762] In reviewing the impugned decision under Act 150, it is obvious that the terms of s 2 have not been complied with and the impugned decision is bad in law as well as on the facts.

[763] I must add that Act 150 does not empower the respondents, especially the first respondent to issue a Circular having force of law. And, this was a point that I had alluded to earlier.

[764] Section 11 empowers the Minister to make Regulations generally for the purpose of Act 150. The circular is clearly not such Regulations made by the Minister; it is issued by the first respondent as the Director General of Immigration. The circular thus cannot claim its source of enabling power to be housed in Act 150.

[765] The same may be said of s 12D of Act 150 which empowers the Minister, the seconnd respondent to give, from time to time, directions to the Director General of Immigration of a general or specific nature not inconsistent with Act 150 as to the exercise of the powers and discretion conferred on the Director General of Immigration by and the duties required to be discharged by the Director General of Immigration under Act 150 in relation to all matters which appear to the Minister to affect the policy of Malaysia. From the contents of the circular, it is patently clear that the circular was never issued under this power in s 12D; there was also no such claim or suggestion. If there were, it would fail as the circular is clearly not a direction nor does it hold out to be issued or prepared pursuant to such direction from the Minister. Absent its source, the circular upon which the respondents blacklisted the appellant, has no force of law.

[766] It then brings me to the point that I had made about the explanation offered by the respondents; that even if the circular is valid, the respondents, certainly not the first respondent, have no power to ban or bar the appellant on the ground that she has criticised the government or that she has committed some offence in that respect. For that matter, the first respondent has no authority to bar any citizen on the ground that the citizen has committed some offence including the offence of disparaging the government unless it is an offence within Act 155 or even Act 150.

[767] This is because the first respondent and the immigration officers are not police and do not have police powers under the Police Act 1963. What the first respondent and the other immigration officers have by way of police powers is only what is expressly provided to them under Act 155 or even Act 150, or under any other specific law. This is evident from section Part VI of Act 155, in particular s 39. The police authority and powers given to every immigration officer to arrest, detain or remove is clearly only for the specific purpose of enforcing any of the provisions of Act 155, not some other legislation. The offences created in Act 155 relate to illegal entry into the country and the unlawful presence in the country and such similar offences. Act 155 does not provide for any offences on disparaging the government;

neither does Act 150. I must add, the creation of such an offence must be expressly provided; there is no room for implying the existence of such an offence.

[768] The respondents have no power to cast upon themselves the right or authority to determine what conduct, action or speech of any person including a citizen, would amount to an offence of disparaging the government. That decision or determination is entrusted by Parliament to the bodies properly authorised under the relevant laws, for example Penal Code or Sedition Act, to act. In this respect, this would generally be the task and responsibility of the police. The respondents are not police and they have no power or authority to determine any offence of that nature or to even investigate or act, even if for a moment there was such an offence committed.

[769] Understanding thus the proper role, function and place of the first respondent under both Act 155 and Act 150 — that the first respondent has no business determining that the conduct or act of the appellant has disparaged or is disparaging the government, the second aspect of the first question must also be answered in the negative.

[770] In short, the first respondent is not a police officer and is in no position to make any determination that the appellant has disparaged the government. That task and duty is given to the police under the Police Act 1963. Hence, the first respondent's reasons, once made available to the court to examine, 'voluntarily, exhaustively and in great detail by the detaining authority for the consideration of the court in which event' the court is entitled to examine, evaluate and assess in order to come to a reasonable conclusion — see *Re Tan Sri Raja Khalid bin Raja Harun Inspector-General of Police v Tan Sri Raja Khalid bin Raja Harun* [1988] 1 MLJ 182 reveal an unlawful act on the part of the respondents.

[771] When the respondents' role in relation to Income Tax Act 1967 (Act 53) or the Perbadanan Tabung Pendidikan Tinggi Nasional Act 1997 (Act 566) is examined, it will then be appreciated that neither of them, especially the first respondent, has any power to ban travel or to even blacklist a person. As explained by the appellant, Act 53 contains fairly elaborate detailed provisions on preventing a person in the circumstances mentioned in s 104 from leaving the country.

[772] Under s 104 of Act 53 and s 22A of Act 566, there are fairly stringent requirements of process that must be observed, including prior notification on the affected person of the intended act of travel ban or restriction, before any restriction is to take effect. It is quite apparent from those legal regimes that the authority or power to issue the certificate containing the necessary details of

debt coupled with a request to the Director General of Immigration to prevent the person concerned from leaving Malaysia lies with those entities. Section 104(2) of Act 53 and s 22A(2) of Act 566 then directs the Director General of Immigration 'to take or cause to be taken all such measures as may be necessary to give effect' to the certificate, including use of reasonable force, and the seizure, removal or retention of any certificate of identity and any passport, exit permit or other travel document relating to that person. There are no such powers given to the Director General of Immigration or to the Minister, whether under Act 155 or Act 150.

[773] Consequently, the respondents' role and responsibility in relation to preventing anyone from leaving Malaysia, is merely facilitative in nature. The 1st respondent assists and facilitates another authority and he can do that as the control of borders or entry points and use of travel documents including passports are within his purview.

[774] Other laws containing provisions similar to s 104 of Act 53 and s 22A in Act 566 may be found in the following legislations, just to name a few — s 15A of the Excise Act 1976 (Act 176); s 17A of the Customs Act 1967 in (Act 235); s 38A in Insolvency Act 1967 (Act 360); s 74A in Stamp Act 1949 (Act 378); s 27 in Tourism Tax Act 2017 (Act 791); s 27J in Companies Commission of Malaysia Act 2001 (Act 614); s 132 in Securities Commission Malaysia Act 1993 (Act 498); Real Property Gains Tax Act 1976 (Act 169); s 39 in Employees Provident Fund Act 1991 (Act 452); and s 44 in Malaysian Anti-Corruption Commission Act 2009 (Act 694). In each and every one of these legislations, the power to restrain the person from leaving Malaysia is expressly provided to the relevant authority or agency but never to the first respondent; and the 1st respondent's role and function is at all times, supportive, facilitative, assisting of that primary authority or agency. The position under Act 155 and Act 150 is no different; more so, when dealing with the offence that the appellant is alleged to have committed.

[775] All these various pieces of legislation show that there must be express power to restrict or ban a citizen from leaving Malaysia. Since there are no express provisions in both Act 155 and Act 150 empowering the respondents to restrict, prevent or ban any citizen from leaving Malaysia, that the first respondent's role is merely facilitative or to assist other departments or agencies who have express and specific power to restrict, prevent or ban any person from leaving Malaysia, the impugned decision is clearly invalid; and any purported exercise of such power in the future, must, under similar circumstances, be patently invalid.

[776] Consequently, within the procedural ambit of challenge, I find that

the respondents have themselves fatally failed to abide by their own procedure and applicable law.

[777] It appears to have been overlooked that Act 150 does not contain any ouster clause, seeming to restrict the court's power to judicially review the impugned decision. Clearly, this recognises that the respondents' discretion is not in the least, unfettered. And, as discussed, the impugned decision is necessarily and more properly a decision under the Passports Act and not the Immigration Act, the impugned decision must and ought to have been so examined by the High Court instead of readily accepting that it is Act 155 that applies. Applying the *Wednesbury* principles, the impugned decision is obviously flawed and, if not retracted, should have been quashed. In such circumstances, suitably couched terms for a declaration ought then to have been granted.

[778] Even if there was an ouster clause, regardless Act 150 or Act 155, it is readily apparent that the impugned decision is patently invalid and must be set aside; and its damage neutralised. Whether under the circular (regardless Act 150 or Act 155) or under the terms of Act 150 itself, the decision of blacklisting and thereby prohibiting the appellant from departing the country is bad and invalid for all the reasons already set out.

[779] Although the blacklisting or endorsement had already been lifted, it is a matter of grave importance to the general citizenry and to the respondents too, that the validity of the impugned decision is still examined. As seen, the respondents have not only made a decision which is wholly irrational and unreasonable [the offending conduct attributable to the appellant had yet to take place], they have acted far in excess of their jurisdiction.

[780] The first question is thus answered in the negative.

Question 2

Whether s 59 of Act 155 is valid and constitutional?

[781] As for the second question, this deals with the right or opportunity to be heard before the Minister or the Director General of Immigration makes an order against the appellant in respect of any matter under Act 155 or any subsidiary legislation made under Act 155.

> 59 Exclusion of right to be heard
>
> No person and no member of a class of persons shall be given an opportunity of being heard before the Minister or the Director General, or in the case of an East Malaysian State, the State Authority, makes any order against him in respect of any

matter under this Act or any subsidiary legislation made under this Act. A

[782] Given that any departure may only be validly prohibited in the manner and conditions as set out in s 2(4) of Act 150, and in the case of the appellant, that was not done, there is thus a violation of s 2(4). Had s 2(4) been complied with, the matter of right to be heard would not have arisen as the first respondent, or his officers, may only endorse on the appellant's passport, after posing questions to the appellant. The respondents acted under their misconceived understanding that there was power and authority to ban or blacklist citizens such as the appellant for the reasons presented in their affidavits but any reliance on s 59 of Act 155, assuming the Act even applies, is entirely misplaced. B C

[783] Be that as it may, regardless the fact that the respondents had proceeded erroneously for the multifarious already reasons discussed, that does not mean that the courts must invoke its jurisdiction to invalidate the provision under challenge. Since Act 155 has no application to the appellant in the particular facts of the appeal, and given that it applies to matters as espoused by her learned counsel, that is the Act is intended to deal with foreigners and their rights to enter, remain and leave Malaysia, the issue of s 59 and its validity is best examined when the appropriate circumstances present. The instant appeal is not such a circumstance. D E

[784] However, where Act 155 applies, the right to be heard is intrinsic to the whole fabric of the administration of justice where the rule of law demands that there must always be fair play. In the exercise of its supervisory jurisdiction, the courts too have never been deterred by provisions of law which do not require that reasons for decisions be given, whether it is to enable an appeal to be undertaken (see *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487) or simply for the person affected to know — see the extensive deliberations of the Federal Court on this issue in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1. What had started off as an exception to the instances when reasons ought to have been given even though there is no statutory requirement to give reasons, has evolved into a norm — that the rules of natural justice require reasons to be provided. F G H

[785] Although that view is expressed in the context of the obligation of decision-makers to give reasons, I see no distinction when it comes to the right to be heard, that before a decision is rendered in respect of any matter under consideration, the rules of fair play require that an accused be informed of the complaints against him, that he has an opportunity to explain, if he so wishes, before a decision is taken. I

[786] There is no doubt in my mind that the actions or decisions of the respondents, as subordinate bodies statutorily conferred specific powers must come under the supervisory jurisdiction of the courts; that Parliament could not possibly leave such bodies or authorities free to do as they please; that in making any decision concerning a citizen as to his right to depart the country, that person does not need to be heard. The contrary must be the correct position in law — see *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152 where the Federal Court took the view that the rules of natural justice require that 'no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative decision, no matter whether it is labelled 'judicial', 'quasi-judicial' or 'administrative' or whether or not the enabling statute makes provision for a hearing'.

[787] This is how the courts have always addressed complaints of violation and breach of natural justice in that the complainants have not been afforded an opportunity to be heard, instead of invalidating the provision. The courts, in exercising its supervisory jurisdiction, will read down the provision to see how such a provision has impacted, if at all the rights of the complainant. In fact, the presence of provisions providing for an opportunity to be heard before a decision is pronounced is still not a bar to the court impeaching that decision on the ground that the opportunity to be heard was not a real, proper or effective hearing and that there has been a breach of natural justice — see *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169 (PC); *JP Berthelsen v Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134 (SC); *Vijayarao a/l Sepermaniam v Suruhanjaya Perkhidmatan Awam Malaysia* [2018] 12 MLJ 17.

[788] Ultimately what is the real meaning and what amounts to an opportunity to be heard depends on the circumstances and nature of each case — see also *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149; [2012] 3 CLJ 577.

[789] Another aspect that appears to have been overlooked is that on the facts, only s 5 of Act 155 applies to the appellant, as a citizen. As pointed out earlier, Act 155 has a different purport, and that is to do with the entry of foreigners and how they are to remain in Malaysia. There is, however, another part to Act 155 which applies to the appellant as a citizen, but which I had not addressed earlier when dealing with the first question as this appeal stands on its own facts and which cautions me against rushing into answering the second question. Here, I am referring to Part VII of Act 155 which contains Special Provisions for East Malaysia from ss 62–74.

[790] Section 64 carries its own peculiar interpretation provisions; and at s 65 is a special provision conferring upon the state authority certain 'general

powers':

65 General powers of State Authority

(1) In exercising his powers under Parts I to VI as a special law for an East Malaysian State the Director shall comply with any directions given to him by the State Authority, being directions —

(a) requiring him not to issue a Permit or Pass, or a specified description of Permit or Pass, to any specified person or class or persons, or to do only for a specified period or on specified terms and conditions;

(b) restricting the marking of endorsements on a Permit, Pass or Certificate; or

(c) requiring him to cancel any Permit, Pass or Certificate issued to a specified person, or to deem a specified person to be an undesirable immigrant, or to declare that a specified person's presence in the East Malaysian State is unlawful, or to order a specified person's removal from the State.

(2) Where the Director takes any action in obedience or purported obedience to any directions given under subsection (1), and there is an appeal to the Minister against that action, the Minister shall not allow the appeal without the concurrence of the State Authority.

(3) An order under section 55 shall not have effect as a special law for an East Malaysian State, except so far as its provisions are by the same or a subsequent order applied to those persons with the concurrence of the State Authority.

[791] The 'State Authority' is defined in s 62 as meaning 'the Chief Minister of the state or such person holding office in the State as the Chief Minister may designate for the purpose by notification in the State Gazette'.

[792] Given that s 59 (and for that matter s 59A) has application to Part VII of Act 155 and Act 155 is law that deals with entry of persons into the East Malaysian States for which there are special safeguards for the constitutional position of Sabah and Sarawak as provided in art 161E(4) of the Federal Constitution, it would be highly improper to find s 59 invalid for the reasons articulated by the appellant; without more and certainly not without having those States heard. The East Malaysian States may well have their justifications and sound reasons for not affording an opportunity to be heard before making its decision under any of the scenarios in s 65. But whether such justifications or reasons will withstand the scrutiny of the court is entirely an exercise which I am not prepared to embark on; that is wholly speculative and wrong.

[793] As reminded at the outset of these discussions, s 59A impacts on powers of entities other than the first respondent and on matters other than the right to travel. The appellant, as I have said, has recognised from the very outset that her right to travel is not absolute, that her right may be curtailed. And,

since s 59 has application beyond the factual matrix of the appellant's case which really is one of not falling within Act 155, I find that the second question must be answered in the affirmative.

Question 3

Whether s 59A of Act 155 is valid and constitutional in the light of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 ('Semenyih Jaya') and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 ('Indira Gandhi')?

[794] I note that this third question is posed in the context of *Semenyih Jaya* and *Indira Gandhi* instead of identifying the specific provisions of the Federal Constitution which are alleged to have been violated so as to render s 59A unconstitutional and invalid. From the submissions filed, it would appear that the argument is thus — that s 59A is unconstitutional because it impinges on the judicial power of the court as enshrined in art 121 and safeguarded by art 4.

[795] In my view, there is no reason to doubt the constitutionality of s 59A, even if for one moment Act 155 applies. Section 59A is not couched in absolute or total terms, offending art 4 of the Federal Constitution or even art 121, as discussed and understood in the various recent decisions of this court. Its validity is saved by its own express limitations which the court has read and applied with much circumspection. The provision does not inhibit the power of the court to intervene, examine and/or set aside any decision made under Act 155.

[796] If at all the validity of s 59A arises, it is only in this limited and narrow respect and that is, since s 59A only provides for a procedural oversight of the respondents' decisions or actions, can the court ever exercise its supervisory jurisdiction by judicially reviewing the decision or action on substantive merits, as was done in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; and followed in *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; *Tenaga Nasional Bhd v Yahaya bin Jusoh* [2014] 1 MLJ 483; *I&P Seriemas Sdn Bhd & Anor v Tenaga Nasional Bhd & Ors* [2016] 1 MLJ 261; and *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753.

[797] I am of the view that there is no need for me to address this aspect since the impugned decision is invalidated by reason of having failed to meet the

procedural requirements as set; even if accepting those requirements are valid to start with. To examine the validity and constitutionality of s 59A for the reasons articulated by the appellant would amount to an overkill, almost smothering a fly with a sledgehammer. In any case, s 59A is law that Parliament is entitled to enact under the powers of legislation as found in art 121 of the Federal Constitution; as explained by my learned brother Abdul Rahman Sebli FCJ.

[798] I must add that I do not agree with the submissions of the appellant on giving the term 'procedural requirements' in s 59A such a narrow construction; that the wider ground of procedural impropriety which is traditionally a ground open to the courts in an application for judicial review to examine administrative or other decisions of subordinate or inferior bodies are supposedly excluded. The principles of procedural impropriety or proportionality are legal principles that the courts and legal counsel employ to examine a decision; to reason why a decision is proper or otherwise. These reasonings and principles can never be abrogated or abolished by a stroke of a pen in any statute without offending the principles of constitutional supremacy for the reasons already discussed in the trilogy of decisions of the Federal Court.

[799] In any case, the appellant accepts that her right to travel is not absolute. From her submissions, it may be readily deduced that the appellant is not asserting that she has an unrestricted absolute right to travel overseas. But, before I deliberate on the existence of this right, it bears well to remember that there is a distinction between the right to travel overseas and the right to leave one's own country. The right to travel is often dependent on personal inclinations and capabilities, particularly economic and financial. It is the right to leave one's own country that is of greater significance as that is not specifically provided in the Federal Constitution unlike the right of movement within Malaysia as provided in art 9. This is also borne out in the terms of international conventions that I will turn to shortly. The issue is whether art 9 of the Federal Constitution implicitly recognises the right to leave Malaysia, as is the approach in some jurisdictions.

[800] Be that as it may, the poser in the first question implicitly accepts that while a person, a citizen, has a right to leave one's own country even under international law, and there are several international conventions dealing with this right; it recognises that such right is not absolute and that there are restrictions on border controls. Amongst the international conventions are art 12 of the International Covenant on Civil and Political Rights (ICCPR); and art 13 of the Universal Declaration of Human Rights (UDHR):

Article 12 [ICCPR]

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The abovementioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre* public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Convention.

Article 13 [UDHR]

1 Everyone has the right to freedom of movement and residence within the borders of each State.

2 Everyone has the right to leave any country, including his own, and to return to his country.

[801] There is also a similar convention under the European Union, Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto — see art 2 on freedom of movement. Under that Protocol, the threshold which a member State must demonstrate has been met before a ban on movement is seen to be lawful in European law is that 'the individual's personal conduct must constitute a genuine, present and sufficiently serious threat to one of the fundamental interests of society and that the restrictive measure is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it' — see *Issue Paper on 'The Right to Leave a Country' prepared by the Commissioner for Human Rights under the Council of Europe'*, October 2013, p 22. The ban cannot be disproportionate to the aim in preventing the person from leaving one's own country — see *Sissanis v Romania* , 25 January 2007 (Application Number 23468/02). Further, any interference with the right to leave must strike a fair balance between the public interest and the individual's right to leave — see *Foldes and Foldesne Hajlik v Hungary* , 31 October 2006 (Application Number 41463/02); and *Nalbantski v Bulgaria* , 10 February 2011 (Application Number 30943/04).

[802] Although Malaysia is not a signatory to the ICCPR, it is interesting to note that art 12 of the ICCPR is not a non-derogable right in that States are permitted to restrict the right to leave in exceptional circumstances, is actually observed in this country. However, such restrictions must be provided by law. Those restrictions may include requiring documents of travel before the right may be exercised but in doing so, the state is required to make the travel documents available at a reasonable cost and within a reasonable time. The refusal to issue such travel documents and thereby the right to leave is permissible only in exceptional circumstances, must be on clear grounds,

proportionate and appropriate under the relevant circumstances.

[803] Interestingly, this right to leave one's own country or this liberty of movement, suggested by the appellant as an 'indispensable condition for the free development of a person'; has been viewed with caution — that it is 'increasingly seen by developed states as an 'inconvenient' human right' — see paper prepared for the *Policy Analysis and Research Programme of the Global Commission on International Migration* by Colin Harvey and Robert P Barnidge Jr, Human Rights Centre at the School of Law, Queen's University Belfast (September 2005) (the Paper). The paper suggests that this right or liberty to leave one's own country must further recognise that it does not entail an automatic right to enter any other State; and that restrictions may be imposed on the right to leave (see art 12(3) of ICCPR). In fact, the 'pressure is exerted on third countries to control the irregular moment of their own citizens'; and that a citizen cannot insist on his right to leave if leaving one's own country was in order to avoid completion of national service obligations as this restriction is seen as a 'reasonable restriction' — see *Lauri Peltonen v Finland* cited in the Paper. The same may be said where the restriction on the right to leave is justified on the ground that it is 'provided by law and necessary for the protection of national security and public order'; that it is to curtail suspected terrorist activities — see case of *Mrs Samira Karker, on behalf of her husband, Mr Salah Karker v France* also cited in the Paper.

[804] I have taken the liberty of examining several other jurisdictions on the issue of whether the right to travel is at all a fundamental right, particularly those countries with written constitutions like us.

[805] First, Australia. Section 92 of the Australian Constitution provides:

> On the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

[806] In its analysis of this provision, the Australian Law Reform Commission noted that in *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 581–2, Murphy J opined that 'The Constitution also contains implied guarantees of freedom of speech and other communications and freedom of movement not only between the states and the states and the territories but in and between every part of the Commonwealth. Such freedoms are fundamental to a democratic society ... They are a necessary corollary of the concept of the Commonwealth of Australia. The implication is not merely for the protection of individual freedom; it also serves a fundamental societal or public interest' — see Australian Law Reform Commission Report in ALRC Report 129 — Traditional Rights and Freedoms — Encroachment by Commonwealth Laws.

[807] This view is however, not shared. In *Williams v Child Support Registrar* (2009) 109 ALD 343, the applicant was unsuccessful in arguing that there was a constitutional right of freedom of movement into and out of Australia. That same Report recognised that freedom of movement 'will sometimes conflict with other rights and interests, and limitations on the freedom may be justified, for reasons of public health and safety'; that the limitations must 'generally be reasonable, prescribed by law, and demonstrably justified in a free and democratic society'; that limits or restrictions on freedom of movement have long been recognised by both common law and other statutes such as criminal laws, customs and border protection laws, citizenship and passport laws, environmental regulation, child support laws, migration laws, and laws restricting entry to certain areas such as parliamentary precincts, defence areas, or aboriginal lands.

[808] Next, is Chapter Two of the Constitution of South Africa which specifically provides in s 21 that: '(1) Everyone has the right to freedom of movement. (2) Everyone has the right to leave the Republic.' This provision applies to all and is not confined to its citizens. However, ss 21(3) and (4) go on to provide that '(3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic. (4) Every citizen has the right to a passport.' This is substantive regulation of the right of persons to leave their territory. However, it must be remembered that s 21 is born out of the deep-seated concerns and pains from South Africa's apartheid history of egregious restrictions and denials on various rights, including the right to freedom of movement and residence– see discussions of the same in *The Right to Freedom of Movement and Residence* by Jonathan Klaaren (2nd Ed Original Service: 03-07). The 'pass laws' were said to be a 'defining feature of apartheid' where one of the most hated of apartheid restrictions on the rights of black South Africans resounded in a common refrain in the anti-apartheid struggle that 'black persons had no place to rest'. The writer opines that procedural regulations regarding departure from the country are clearly constitutional within the terms of s 21(2), that these provisions are 'usually not intrusive and certainly yields benefits of information to the state in its efforts to promote development and, at least in the case of its nationals, to protect their rights beyond the borders of the territory'.

[809] In the case of India, art 19(1)(d) of the Constitution of India 1949 guarantees all citizens of India the right 'to move freely throughout the territory of India' but this right is subject to reasonable restrictions as set out in art 19(5) which are imposed in the interest of the general public or for the protection of the interest of any Scheduled Tribe. However, in *Satwant Singh Sawhney v Ramarthnam, Assistant Passport Officer, New Delhi & Ors* AIR 1967 SC 1836 where the petitioner had contended that his personal liberty guaranteed under art 21 of the Constitution of India had been infringed when the respondent

called upon him to surrender the two passports which had been issued to him for the purposes of his travels abroad, the Supreme Court of India agreed with the petitioner that the right to travel abroad is part and parcel of personal liberty guaranteed under art 21. *Satwant Singh* was considered by the High Court in *Loh Wai Kong v Government of Malaysia & Ors* [1978] 2 MLJ 175, where ultimately our Federal Court held that the right to travel abroad was in truth, only a privilege.

[810] These cases show that even if the right to travel or leave the country is regarded as falling within art 9 of the Federal Constitution, or even for one moment within art 5, that right is not absolute. It is indeed only a privilege. This privilege is further reflected in the words found in every passport issued by the Immigration Department:

> *Bahawasanya atas nama Seri Paduka Baginda Yang di-Pertuan Agong Malaysia, diminta semua yang berkaitan supaya membenarkan pembawa pasport ini melalui negara berkenaan dengan bebas tanpa halangan atau sekatan dan memberikan sebarang pertolongan dan perlindungan yang perlu kepadanya.*
>
> *This is to request and require in the Name of His Majesty Yang di-Pertuan Agong of Malaysia, all whom it may concern allow the bearer of this passport to pass freely without let or hindrance, and to afford the bearer such assistance and protection as may be necessary*. (Emphasis added.)

[811] In short, the right to leave our shores is not absolute. This right may be curtailed by reasonable means and on reasonable grounds. Those grounds are not met in this appeal and since I have concluded that the respondents do not possess any power or authority whatsoever to police the offence of disparaging the government [no provision of law has actually been identified by the respondents], the respondents cannot bar the appellant from leaving the country. That decision to ban the appellant from leaving is always subject to scrutiny of the court and s 59A implicitly recognises that.

[812] Another aspect to s 59A is this — it prescribes the remedy or cause of action that affected persons including citizens may take in the event they wish to challenge any action or decision taken by the respondents under Act 155. It provides what the potential litigant may complain about or how he is to ground his complaints for a judicial review. This is consistent with the right of the appellant, as a citizen to have access to justice and in fact, is entitled to the equal protection of the law.

[813] Now, how the court is to deal with the complaint when approached for the exercise of its supervisory jurisdiction is not a matter which is spelt out or can be dictated by the terms of s 59A. That power, authority or jurisdiction is provided for in art 121 read with art 4 and more specifically, in the Courts of Judicature Act 1964 (Act 91). It is in those sources that the court takes its power

and jurisdiction, including inherent power; and it is through legal reasoning and jurisprudence that the court determines whether its powers within its supervisory jurisdiction would be engaged in any particular cause. Legal principles of reasoning such as the rules of natural justice, the *audi alterem partem* rule; the *Wednesbury* principles of procedural impropriety, illegality, irrationality and unreasonableness (see *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223; and *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374), mala fides, abuse of process, are but a few such principles.

[814] In an application for judicial review, the court exercises its supervisory jurisdiction as opposed to its original and appellate jurisdiction. In the exercise of its supervisory jurisdiction, the merits of the decision are not of primary concern; it is the process or the procedure that is scrutinised. And, in determining whether those processes or procedure have been complied with, the courts use, amongst others, its powers and tools of principles and reasoning to reach its answer. As alluded to earlier when dealing with the first question, this task is not mechanical, passive or grammarian; it is a heavy responsibility carefully shouldered so that proper direction may be shown so that the same errors are not repeated; and generally, for better administration. These tools of reasoning can never be legislated; it would lead to sheer exhaustion.

[815] Consequently, once appreciated in that light, there is nothing unconstitutional or invalid in s 59A, especially in the context and circumstances of the appellant. This question is thus answered in the affirmative.

[816] In such circumstances, the court must show its disdain and grant the declaratory order best suited to the prevailing facts as stated in my learned brother Abdul Rahman Sebli's judgment.

[817] My learned sister, Rohana Yusuf PCA, my learned brother, Abdul Rahman Sebli FCJ and my learned sister Hasnah Mohammed Hashim FCJ, have read this part of the judgment in draft and they concur with the reasons and conclusions reached.

Order accordingly.

Reported by Ashok Kumar